No. 13,545

IN THE

United States Court of Appeals

For the Ninth Circuit

R. W. MEYER, LIMITED,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

PHIL CASS,
2186 City View, Eugene, Oregon,
SAMUEL SHAPIRO,
506 Stangenwald Building, Honolulu, T. H.,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Texts

Annotations

Statutes

No. 13,545

IN THE

United States Court of Appeals

For the Ninth Circuit

R. W. MEYER, LIMITED,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

Comes now R. W. Meyer, Limited, appellant in the above entitled case, and submits its opening brief in support of its appeal, as follows:

STATEMENT OF THE JURISDICTION OF THE COURTS.

This case originated in the Land Court of the Territory of Hawaii, by a petition to register and confirm the title of R. W. Meyer, Limited, an Hawaiian corporation, to lands situate in Molokai, Territory of Hawaii, which have a claimed reasonable value of $750,000.00, as set out in petition. The Land Court has jurisdiction of such cases, Section 12600, Revised Laws of Hawaii, 1945, and by special act of the

Legislature of Hawaii, contained in Act 207 of the Session Laws of Hawaii, 1947, additional jurisdiction to hear and determine the claim of applicant for rents and damages for occupancy of the land by the Territory, Copy of Act 207, Session Laws of Hawaii, 1947, annexed to amended application, certified record pages 34-39, which rental and damage claim is in the sum of $565,000.00. All of which value and claims depend upon the determination of the issue now before this Court of Appeal. The Supreme Court of Hawaii had jurisdiction of the case through a writ of error, issued on petition of appellee, R. 5, writ at R. 13, by virtue of Section 12635, Revised Laws of Hawaii, 1945. The jurisdiction of this Court lies on appeal from judgment on writ of error of the Supreme Court of Hawaii, under authority of Title 28, U.S.C.A., Section 1293, permitting appeals to the United States Court of Appeals for the Ninth Circuit from all final decisions of the Supreme Court of Hawaii, where the amount in controversy exceeds $5,000.00, exclusive of interest and costs. The value in excess of $5,000.00 is shown above.

STATEMENT OF THE CASE.

This is a case for registration of title under the Torrens System adopted by Hawaii. No issue is made of the basic title, but there is a dispute as to the boundary of the abutting lands where the appellee owns the Leper Settlement adjoining. (R. 61.) The

issues were defined and limited by the parties to the issue of the location of this common boundary on the ground, stipulation being made and approved that this issue should be heard and determined, including appeal, before the supplementary action, second cause, for the damages, should be tried. (R. 43, 60, 61, and restated by the Court and agreed, R. 416.)

The controversy arises from the description in the original patent 3437 (Applicant's Ex. B), of the course "thence around the head of Waihanau (valleys) and Waialeia Valley". The applicant, appellant, claiming that the location of the line described was in accordance with a well-known, ancient land boundary of the original parcel, identified by parol evidence, the field book of the surveyor writing the description (Terr. Ex. 16), the acceptance of the boundary line claimed through many years of occupancy and exclusion of the lepers from this land by the predecessor in title of appellant and the government officials in charge of the leper settlement, the intent of the parties, as shown by the correspondence in evidence, and the topography showing a natural, impassable boundary at this point. The appellee claims that a sketch attached to the Patent 3437, by means of a meander line locates the boundary on the ground at a point some 2,000 feet above the line claimed by the appellant. The issues are raised by the amended application (R. 14) (erroneously indexed in the record as "Amended Application for Writ of Error"), with maps attached, the answer of

the Territory of Hawaii (R. 18), with map attached, the assignment of errors by appellee in the Supreme Court (R. 5), and the opinion of the Supreme Court of Hawaii (R. 38).

The Land Court, after a hearing on the facts, adopted the testimony of the witnesses and other evidence of the location of the line as claimed by the appellant, and located the line as claimed. On writ of error to the Supreme Court of Hawaii, the decision was reversed. The Supreme Court of Hawaii held that the sketch controlled the boundary line over the location of that line on the ground as shown by parol and extrinsic evidence, and adopted the line given in opinion testimony of government surveyors, without any direct evidence as to the ground location, other than the laying out of the meander line of the sketch attached to the grant by means of office triangulation translated into a newly surveyed reproduction of the meander line on the ground.

The issues raised on appeal to this Court are as follows:

Is the sketch attached to the Patent 3437 controlling as a boundary line over the description "around the head of Waihanau Valley" as identified by the testimony of witnesses knowing that line, and extrinsic evidence as shown above? Raised by statement of points.

Can the testimony of surveyors be admitted to determine the location on the ground of a meander line on a sketch in the absence of any factual knowledge

by the witnesses of the location on the ground of the monument described, which the meander line is supposed to indicate? Raised by statement of points.

Does the Supreme Court of Hawaii have jurisdiction on hearing a writ of error from the Land Court of Hawaii to reconsider the evidence and retry the facts? Raised by Section 12633, Revised Laws of Hawaii, 1945.

In view of the evidence and the finding of facts by the Land Court, was the reversal of its decree erroneous? Raised by statement of points, and by the decision in the Supreme Court of Hawaii. (R. 38.)

Does the factual location on the ground of a line of boundary described as a natural monument constitute "varying or contradicting a written instrument"? Raised by the opinion of the Supreme Court. (R. 39.)

Are "progressive maps," admittedly added to and changed since the date of the grant, without record or information as to the nature and extent of the changes, admissible to fix a boundary not identified on the map by monument? Raised by opinion of Supreme Court (R. 38) and statement of points.

Where a sketch is attached to, but not incorporated in by reference, a grant, having on its face no indication of topography, authorship, scale, directions or source of data, can such a plat control the boundary as against a description of a natural monument identified by witnesses and extrinsic evidence? Raised by assignment of errors (R. 5), opinion of Supreme Court (R. 38), and statement of points.

The argument follows the appellant's points (R. 417) in order, each point being copied at the head of the argument concerning it.

ARGUMENT.

POINT 1.

THE DECISION OF THE TRIAL COURT WAS FULLY SUPPORTED BY COMPETENT EVIDENCE AND IT WAS ERROR BY THE SUPREME COURT OF HAWAII TO REVERSE THE DECISION OF THE TRIAL COURT.

The parties limited the issue to be tried to the question of the location on the ground of a call in the patent (Ap. Ex. B) which reads "thence around the head of Waihanau Valley" (R. 42, 61, 412). This appears as an unsurveyed "meander line" (R. 43, 49, 54) between the property of the parties (R. 61) on a sketch attached to the patent (Ap. Ex. B). The Supreme Court of Hawaii held that the description of the call was unambiguous. (R. 47.) This leaves the sole issue to be determined a matter of fact, the location of the call upon the ground. Title, other than the location of the boundary, is undisputed.

What is a boundary is a matter of law. Where it is located on the ground is a matter of fact.

McCandless v. DuRoi, 23 Haw. 51;
Kelekolio v. 'Onomea, 29 Haw. 130;
Sale v. Pulaski, 117 S.W. 404;
Montana Mining Co. v. St. Louis, 183 Fed. 51;
Cole v. Mueller, 187 Mo. 638;
Boundaries of Pulehunui, 4 Haw. 239-243.

The true location of boundaries may be shown by parol evidence.

Hooten v. Comerford, 23 Am. St. 861 (Ann.).

Under the well established rule of law that such evidence is always admissible to apply a writing to its subject, and, therefore, to identify monuments called for in descriptions of tracts of land contained in patents and deeds.

Brown v. Huger, 21 U.S. 305, 16 L. ed. 125.

Where there is a dispute concerning the true location of natural objects called for in a grant or deed, and the evidence is conflicting, or where the evidence tends to show two or more natural objects that may answer the description, the boundary must be determined by the jury under the court's instruction.

Parran v. Wilson, 154 Atl. 449.

Natural objects called for in a grant may be proved by testimony not found in the grant but consistent with it.

Blake v. Dougherty, 5 Wheat. 359, 5 L. ed. 109.

The evidence which the Hawaiian Supreme Court rejected is as follows:

The land is a part of the Ahupuaa (land tract assigned to an overlord) of Kahanui. It is a lele (outlying tract separated from the main ahupuaa). The whole ahupuaa was originally awarded to the konohiki (overlord), including, by name, and unsurveyed, the lele. In order to perfect his title, the

overlord was required to have the land surveyed and the survey filed, whereupon a patent granting the land in fee simple would issue. This overlord, by some mistake of the surveyor, failed to file the survey of the lele now in dispute, but transferred his title to the ahupuaa by deed, by ancient boundaries, to R. W. Meyer. (Ap. Ex. T-U.) Meyer was then in occupancy and had been since about 1850. (R. 188.) (Mrs. Aubery, born in 1868, was the youngest of nine children born at Kahanui of R. W. Meyer and his wife, a local Hawaiian girl.) He and his successors continued in occupancy until 1924 without any question being raised as to the boundary.

In 1885, M. D. Monsarrat, a government surveyor, was engaged in making a survey of lower Molokai along the southern boundary of the land in dispute (Terr. Ex. 16), verifying old surveys of lands, including the main Meyer ranch of Kahanui (Terr. Exs. 6 and 16), when he was advised of the existence of this lele (Terr. Exs. 6-7) by Kamaainas (persons raised on the land familiar with boundaries). He informed Meyer of the discrepancy in his title and Meyer had him write a description (Terr. Ex. 19) of the lele, which was later, by Meyer, furnished the government for the purpose of sale of the land to Meyer under the law (Sections 42, 43, 44, 45, Compiled Laws of Hawaii, 1884, Appendix page i. Monsarrat drew a sketch in his field book (Terr. Ex. 16, page 112) of the boundaries of the lele, placing that boundary on the big waterfall now claimed by appellant to be the "head of Waihanau Valley".

Meyer was a surveyor. (R. 178.) He was the agent for the leper colony and for the owner of Makanalua, from whom appellee takes title. (Ex. R, Ap. Ex. C-1.) In return for his services he had been promised a tract of land at a nominal sum. (Ap. Ex. C-1.) He had selected the Waihanau Valley, which was then a "part and parcel of the leper colony", as his tract, but, becoming convinced that lepers were a permanent feature, wanted no part of the "Waihanau Valley". (Ap. Ex. C-1.) He had for many years occupied the land above Waihanau Valley and had put up "kapu" (forbidden) signs on the top of the big falls, where there was an ancient boundary stone. (R. 174, 186, Ap. Ex. R.) This was expressly to keep the lepers off the lele which he occupied. (R. 174-186.) The officials in charge of the leper settlement cooperated in keeping the lepers off and recognized that boundary. (Ap. Ex. R, R. 174.)

When Meyer was advised of the defect in his title, he wrote Thurston, Secretary of the Interior, reciting the above facts, and asking that he be given a patent for his land. (Ap. Ex. C-1.) Thurston wrote back that a patent could not then be granted and that Meyer could either go to the legislature for relief or purchase the land title at public auction. (Ap. Ex. E.) Meyer then wrote Thurston offering to purchase the whole of the land occupied by him and constituting the ancient lele that he had bought by ancient boundaries, enclosing Monsarrat's description of the land. (Ap. Ex. C-3.) The land was then advertised as the "whole of the remnant or lele of Kahanui" (Ap. Ex.

D-2), under the law that required a description to be filed but did not require a map (see Section 42, Compiled Laws of Hawaii, 1884, Appendix page i). Maps and surveys are differentiated in Section 45. The land was accordingly knocked down to Meyer (Ap. Ex. D-2), and a patent issued (Ap. Ex. J). Meyer was dissatisfied with the description on the patent, and returned it to Thurston with a penciled notation of the true description on it in Monsarrat's handwriting. (Ap. Ex. J.) There had been attached to the patent by the "young man who fills out the patents" (Ap. Ex. L) a plat or sketch, with nothing on the sketch to indicate that it was to scale or that it was a surveyed map (Ap. Exs. J, B), the disputed boundary being run in as a "meandering line" (R. 43, 52, 53, 54), without monument, station or other location except the point of beginning and terminus (Ap. Ex. B). This is the first and only indication that Meyer ever had that the parcel had been sketched. He knew it had not been traversed. (Terr. Ex. 16.) Thurston, speaking from "an examination of the records", said that he would correct the clerical errors, but could not legally add to the area of the description. He offered to sell for a nominal sum at a private sale the excluded portion, which he admitted should have been in the original description of the lele. The original patent was corrected as to spelling of place names and returned to Meyer.

Meyer and his successors continued in possession of the land down to the big falls until 1924, when negotiations were commenced for its purchase by the

Territory, and, these failing, a condemnation suit was started, in 1929. (Ap. Ex. W.) The condemnation suit (Ap. Ex. W) was the first dispute as to this boundary which has persisted to now.

From the above, it will be seen that Meyer knew the boundary of Waihanau Valley to be below the big falls "wholly within the leper colony"; Monsarrat knew that the boundary was below the falls (Terr. Ex. 16), he ran the boundary through the falls in his field book and noted "Waihanau Valley" below the falls (R. 332, Terr. Ex. 16, page 112). He prepared the description from this sketch. (R. 334.) This is factual evidence of the location of this boundary known to the parties.

The following witnesses were all reared on the land from infancy. All but Tuitele were born on the land. All had contact with R. W. Meyer in his lifetime. All knew intimately the old Hawaiians of the neighborhood. They all testified positively that "Waihanau Valley" is the name of the box canyon below the falls and the falls constituted the boundary (as set out below).

Aubery, 82 years old (R. 184), daughter of R. W. Meyer (R. 183), picnicked with her father at the edge of the falls many years before the date of the patent (R. 185). Her father then occupied the land (R. 185), claimed it as his own, and had redwood posts and kapu signs at the head of the falls to keep off the lepers (R. 186, 174, Ap. Ex. R). She was nursed and raised by the old Hawaiians who knew the boundaries. (R. 188.) The edge of Waihanau

Valley is the edge of the big falls. (R. 185.) There was an ancient boundary stone at the head of the falls. (R. 186.) There was a path across the head of the falls that was ancient when she was a girl. (R. 189.) Waihanau is wholly Makanalua, the leper settlement. (R. 192-193.)

Tuitele, 62 years old (R. 172), born in Honolulu (R. 173), but raised in Molokai on these lands from before she was four years old. Picnicked at the head of the big falls with her grandfather before she was four. (R. 173-180.) Married the doctor in the leper settlement and lived there thirty years. (R. 175.) There were redwood posts at the head of the falls from her earliest recollection. (R. 174.) She knows the location of the Waihanau Valley from her grandfather, the cowboys, the old Hawaiians, and her uncles, and her contact with the members and officials of the leper settlement. (R. 174, 178, 179.) Waihanau Valley runs from the sea to the big falls. (R. 182.) Waihanau Falls are below the land of her grandfather. (R. 182-183.)

Ernest Meyer, 58 years old (R. 198), grandson of R. W. Meyer, born on the land, spent all his life there. Knew his grandfather, his uncles, and the old Hawaiians in the vicinity. Learned the location of Waihanau from them. (R. 198.) Waihanau Valley lies below the big falls. (R. 199, 201.) The name of the high falls is Kaulahuki. (R. 200.)

Penn Meyer, 42 years old, born on the land, knew all the old folks (R. 205); quoting his father, he said

the boundary was below the big falls which are named Kaulahuki (R. 205).

William Meyer, now dead, would be about 75 years old. Born on the land, lived there all his life. (R. 403.) Names old Hawaiians he knew who told him of the location of Waihanau over fifty years ago (R. 404-405); showed on the map "he is following the ridge he says exists there down to the waterfall, through the waterfall, and up the ridge to the top" (R. 407). The high falls at the head of Waihanau Valley, where he pointed out the line crossing the falls, there is a ridge, a steep ridge running down from one side, and up the other from the falls. (R. 409.)

The Territory introduced in evidence the description of the survey of Makanalua (the leper settlement) deeded to the government in 1866, description by Pease, 1865 (Terr. Ex. 9), by which the common boundary is described as "following the top of the pali bounding Makanalua gulch or ravine, on the west to a certain mountain peak at the head of said gulch called 'Kaulahuki'." It was agreed by McKeague and Newton, the surveyors, that Pease never traversed this course, but "fudged it in". (R. 108, 281.) The name "Kaulahuki" given to the place at the head of the valley by Pease, described by him as a mountain peak, is shown to be the name of the big falls. (R. 200, 205, 80.) McKeague, a surveyor, made inquiry among kamaainas to locate the boundary. (R. 78.) He was informed that the name of the big falls

was "Kualahuki" and drew his map as translation of the kamaaina testimony he had received. (R. 80.)

> "Monsarratt, surveyor, gave testimony that the survey and map before the commissioner was made along the lines which the above witnesses and other kamaainas had pointed out to him. We do not transcribe; it is not original testimony. What is admissible is that he has translated the description of the kamaainas into the definite expression of the survey. Boundaries of Pulehunui, 4 Haw, 239, 245."

Ernest Meyer: "The second fall of the big falls is called Kaulahuki. I have never heard the name Kaulahuki referred to a mountain peak." (R. 202.) Penn Meyer: "I used to hear some of the old Hawaiians say it (the big falls) used to be Kaulahuki." (R. 205, 206.) There is a mountain called Kaulahuki on Molokai, a government triangulation station, but it is about 4,000 yards south of the boundaries of this land and could not possibly be boundary monument, according to Newton, government surveyor. (Terr. Ex. 16, p. 111.)

Howell, government witness, says that the description under dispute is a matter of interpretation (R. 401) and that the name "Waihanau" is not the name of the whole watershed, but is the local name of a small area. (R. 402.)

The Supreme Court of Hawaii quotes with approval (R. 48) the case of *Ookala v. Wilson,* 13 Haw. 127, as follows:

> It is settled that parol evidence is admissible when the question is one of location as distin-

> guished from one of construction, that is, such evidence is admissible to connect the land with the grant or to apply the grant to the land.

The issue before the court was exactly that. The Supreme Court so holds "The sole issue before the Land Court for determination by stipulation of the parties was the location of the middle western portion." (R. 42.) "The crux of the case concerns the location of a portion of boundary, rather than a construction of the grant" (R. 48), and quotes with approval *Ookala S. Co. v. Wilson,* 13 Haw. 127-131: "It is settled that parol evidence is admissible when the question is one of location, as distinguished from one of construction." (R. 48.) By stipulation and approval of the court, the court was limited; "determination of the language 'the head of Waihanau valley' how the resulting ground boundary line resulted from the finding? That is, as I understand it, the original stipulation." Mr. Flynn: "Yes, that is it." (R. 416.) The resulting *ground* boundary line is a question of location. Without proof of the location of the line on the ground the grant cannot be connected with the land, or the land with the grant. The erroneous assumption, by the Supreme Court, that "Waihanau Valley" is a generic term for the watershed, the line to be placed anywhere within that area, is responsible for the false authority placed with the opinion evidence adopting the "meander line", so called by all the surveyors and the Supreme Court (R. 43, 49, 53), of an unsurveyed (R. 314), untraversed (R. 322),

unidentified sketch and the maps copied therefrom (R. 339), as superior to the definite, unambiguous language (R. 47) of the call. Under any theory of procedure, where there is a meander line unmarked on the map by any landmark or monument, factual parol testimony is required to tie the boundary in and define its course on the ground, otherwise the grant is defective and the description meaningless. Even the erroneous adoption of sketches and maps divorced from the field books of the surveyor, as appears in the Supreme Court's opinion as being superior to and overruling the written description, requires some tie-in with the earth for identification, which was not supplied by the appellee or from the record.

Not one witness was produced by appellee familiar with the ground. No one testified for the appellee from the knowledge of the boundary, the location of Waihanau Valley, or the identity of any monument along the disputed line, except the monument "cross on rock" where the line starts. Newton, the government's surveyor, laid out on the ground, from office triangulation, the course of the meander line, but looked for no monuments before making his own independent map. (R. 343.) His opinion and the opinion of the other surveyors called by the government, all admittedly based upon the acceptance of the meander line as a rigid, permanent, controlling boundary, and testifying directly that their opinions were taken from the map. Newton: "I haven't made many trips to Molokai, I am not too familiar with that section." (R.

318.) Howell: "The description of this survey depends upon interpretation." (R. 407.) Jorgenson: "I had a map" (R. 384, 381), can have no validity in fixing the ground line in the absence of either physical monuments or points, named in the description, by mathematical process.

POINT 2.

THE ISSUES BEFORE THE TRIAL COURT WERE RESTRICTED BY A STIPULATION ENTERED INTO BY THE PARTIES (R. 42, 61, 416) THAT THE SOLE ISSUE TO BE TRIED WAS THE QUESTION OF THE LOCATION OF BOUNDARIES ON THE GROUND DESCRIBED IN THE ORIGINAL GRANT AS A COURSE "AROUND THE HEAD OF WAIHANAU AND WAIALEIA VALLEYS". THE EVIDENCE FOR THE APPELLANT WAS FACTUAL, ORAL TESTIMONY, SUPPORTED BY DOCUMENTARY EVIDENCE OF THE INTENT OF THE PARTIES AND THE RECORD OF THE SURVEYOR WHO WROTE THE DESCRIPTION OF THE COURSE AT ISSUE, FIXING THE BOUNDARY IN ACCORDANCE WITH APPLICANT'S CLAIM. THE RESPONDENT TERRITORY OF HAWAII OFFERED NO PROOF OR EVIDENCE OF THE LOCATION ON THE GROUND OF SAID LINE BUT RELIED ON THE OPINIONS OF GOVERNMENT EMPLOYEES, WITHOUT KNOWLEDGE, BASED UPON A "MEANDER LINE" OF THE SAID BOUNDARY, TRACED UPON THE GOVERNMENT MAPS AT UNKNOWN TIMES BY UNKNOWN PERSONS AND REPRODUCED WITHOUT REGARD TO KNOWN MONUMENTS BY INDEPENDENT GOVERNMENT SURVEYS. IT WAS ERROR IN THE SUPREME COURT OF HAWAII TO ACCEPT AND ADOPT THE TESTIMONY SO OFFERED IN FIXING THE BOUNDARY DIFFERENT FROM THAT ADOPTED BY THE TRIAL COURT.

Monsarrat, surveyor, gave testimony that the survey and map before the commissioner was made along the lines which the above witnesses and other kamaainas had pointed out to him * * *

We do not transcribe this because it is not original testimony. What is admissible is that he has translated the description of the kamaainas into the definite expression of the survey. (R. 250-251.)

Survey and plat which might be in existence in any office of the government would not in itself be evidence of a boundary if it had not been incorporated in an award or patent.

Boundaries of Pulehunui, 4 Haw. 239-245.

It is also settled that parol evidence is admissible when the question is one of location as distinguished from one of construction, that is, such evidence is admissible to connect the land with the grant or the grant with the land.

Ookala v. Wilson, 13 Haw. 127-131.

There is a diagram on the face of the patent which shows that this course was along the coast but at present we are considering only the description contained in the patent.

Ookala v. Wilson, 13 Haw. 127-130.

It then went further and found on all the evidence that CE was the correct line and added that this was also the practical construction put upon the description for many years by the parties hereto and their predecessors, including the government, which is the owner, and the lessees, of the adjoining land * * * We cannot say that the trial court erred. (diagram attached.)

Ookala v. Wilson, 13 Haw. 127-136.

The natural monument along the entire front is given as the edge or shore of the sea. This, of

course, would control courses, distance and area, in the absence of a clearly indicated intention to the contrary. (diagram attached.)

Brown v. Spreckels, 14 Haw. 399-405.

* * * The true location of boundaries may be shown by parol evidence (Hooten v. Comerford, 23 Am. St. 861, Ann. 6 LRA (NS) 938) under the well established rule of law that such evidence is always admissible to apply a writing to its subject, and therefore to identify monuments called for in descriptions of tracts of land contained in patents and deeds.

Brown v. Huger, 21 U.S. 305, 16 L. ed. 125, 13 L.R.A. N.S. 958.

Natural objects called for in grant may be proved by testimony not found in grant but consistent with it.

Blake v. Dougherty, 5 Wheat. 359, 5 L. ed. 109.

The rule now generally established in the United States, however, is that evidence of common repute is admissible as to the location of a private as well as a public boundary line.

Ann. 47 Am. St. 602.

What are boundaries is a question of law and where they are is a question of fact.

Kelekolio v. Onomea, 29 Haw. 130.

The identity of a monument found on the ground with one referred to in a deed is a question for the jury.

McCausland v. York, 174 A. 383.

Where there is a dispute concerning true location of natural objects called for in grant or deed, and the evidence is conflicting, or where the evidence tends to show two or more natural objects that may answer the description the boundaries must be determined by the jury under the court's instructions.

Parran v. Wilson, 154 A. 449.

* * * The declarations of a former owner are admissible in evidence, but in order that they may be received, they must establish some fact, as a corner stone or particular marked line.

Boardman v. Reed, 6 Pet. (U.S.) 328, 8 L. ed. 415.

The boundary line of a public grant may not be changed by a survey or resurvey made several years after the original survey under which the land was granted (190 U.S. 452) nor are the decisions of the Land Department assuming to fix the boundary in accordance with the surveys admissible in evidence.

U. S. v. State Investment, 264 U.S. 206, 68 L. ed. 639.

What is the boundary between certain lands is a matter of law, but the location of that boundary is a matter of fact.

Kelekolio v. Onomea, 29 Haw. 130-134;
Smith v. Smith, 110 Mass. 302-304;
Whitehead v. Regan, 106 Mo. 231-236;
Taylor v. Femby, 22 So. 910-12;
Mitchell v. Williams, 76 S.E. 949;
McCandless v. DuRoi, 23 Haw. 51-53.

In that event the rule would apply that "course and distance will yield to known visible and definite objects whether natural or artificial". 5 Cyc. 913-921. This is unavoidable where, as here, the bank of the auwai, (water ditch) is the boundary.

McCandless v. DuRoi, 23 Haw. 51-54.

The south bank of the auwai being irregular, the located points given in the former decree are to be taken as meander points merely, and are not to be regarded as points on the exact boundary * * * In other words, the straight lines from point to point, as shown on the plan attached to the description in the former case, were not intended to be, and are not, claimed to be boundary lines. They are mere meander lines * * * These are called meander lines and they are not the boundary of the tract, but they merely define the sinuosities of the stream which constitutes the boundary, and as a general rule, the mentioning in a deed or grant, of a meander line on the bank of a river as a boundary, will convey title as far as the shore, unless a contrary intention is clearly apparent, 4 RCL p. 97, See also 5 Cyc. 899, Whitaker v. McBride, 197 US 510-512, Freeman v. Bellegarde, 108 Cal 179-185, Stemstreet v. Jacobs, 118 Ky. 745-749, Tucker v. Mortenson, 126 Minn. 214. In Mitchell v. Small, 140 US 406-414, the Supreme Court said "It has been decided again and again that the meander line is not a boundary but that the body of water whose margin is meandered is the true boundary."

McCandless v. DuRoi, 23 Haw. 51-56.

The meander lines run along or near the margin of waters are run by the government for the pur-

pose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

McDade v. Bossier Levee Board, 33 So. 628-630, 109 La. 625, quoting and adopting definition in *Hardin v. Jordan,* 11 S. Ct. 811, 140 U.S. 380, 35 L. ed. 428;

St. Paul & P. R. Co. v. Schurmeier, 74 U.S. 272-286.

A meander line generally contains a call for a natural object or monument which will usually control over calls for course and distance.

State v. Armin, Tex. Civ. App., 173 S.W. 2d 503-509.

A meander line is not a boundary.

City of Cedar Rapids v. Marshal, 203 N.W. 932, 199 Iowa 1262.

"Meander line", whether state or national, is not considered a boundary line.

McLeod v. Reyes, 40 P. 2d 839-844, 4 Cal. App. 2d 143.

"Meander lines" are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream.

Seabrook v. Coos Bay Ice Co., 89 P. 417-418, 49 Or. 237.

A "meander line" in an official survey is not a line of boundary, but as said in Horne v. Smith,

15 S. Ct. 988, 159 U.S. 40, 40 L. ed. 68, is used as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

Tolleston Club of Chicago v. Lindgren, 77 N.E. 818-820, 39 Ind. App. 448;

State v. Tuesburg Land Co., 109 N.E. 530-538, 61 Ind. App. 553;

Jones v. Pettibone, 2 Wis. 308-320.

A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

Sherwin v. Bitzer, 106 N.W. 1046-1047, adopting definition in *Whitaker v. McBride,* 25 S. Ct. 531, 197 U.S. 510, 49 L. ed. 857.

Meander lines are run in surveying public lands to ascertain the quantity of lands subject to sale, not to bound the tract.

Producer's Oil Co. v. Hanzen, 238 U.S. 325, 59 L. ed. 1330, 35 S. Ct. 755;

Security Land & Ex. Co. v. Weckley, 193 U.S. 188, 48 L. ed. 674, 24 S. Ct. 431;

French-Glenn Livestock Co. v. Springer, 185 U.S. 47, 46 L. ed. 800, 22 S. Ct. 563;

Niles v. Cedar Point Club, 175 U.S. 300, 44 L. ed. 171, 20 S. Ct. 124;

Annotation 42 *L.R.A.* 510, 94 Am. St. 541.

A map means not only a delineation giving a general idea of the land taken, but also such full

and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part, with courses and distances, so that every part can be found.

Hollister v. State, 77 Pac. 339, 9 Idaho 651.

So that the making of a map of an addition implies that the addition had been surveyed, and that such survey was marked on the ground so that the streets, blocks and lots can be identified.

Burke v. McCowen, 47 Pac. 367-368, 115 Cal. 481.

As to the official maps in the general Land Office, they represent nothing more than the draftsman's and commissioner's opinions and conclusions from the records and available information as to the location of the various surveys with reference the one to the other.

Weatherly v. Jackson, 71 S.W. 2d 259-263.

In an action involving boundary, fact that there were no marks on ground indicating location of lines as claimed by plaintiff was strong evidence that such lines never were surveyed or could not be ascertained.

Neill v. Ward, 153 A. 219, 103 Vt. 117.

A map or plot is not conclusive * * * or although it is annexed to an original grant and made a part thereof to indicate the shape and location of the boundaries.

Gunter v. Whiting Mfg. Co., 81 S.E. 1070.

The location of monuments is a question of fact for the jury.

Emvil v. Smith, 242 N.W. 407;

Wilson v. McCoy, 103 S.E. 42.

It was argued that the original maps and the reports should have been admitted as memoranda to refresh the memory of Mr. Barker the surveyor. Such memoranda may be used by a witness to refresh his memory, but may not be admitted as independent evidence.

Brown v. Reay, 96 Cal. 462-65;

Estate of Flint, 100 Cal. 391-99;

Estate of Benton, 131 Cal. 472-480;

Marcone v. Dowell, 178 Cal. 393-406.

The original survey and accompanying plat may always be considered to correct a mistake in the calls of a patent.

Combs v. Virginia Iron, 106 S.W. 815.

Registered Map 939 of the survey department of the Territory includes the outlines of the land of Kahua as a whole as well as many lands to the north and others to the south and has the words "Kahua 2nd" written substantially across the portion in dispute. This map was presumably based on patents and leases and perhaps upon kamaaina testimony, although this was not made to appear by the evidence. It is simply the conclusion that the government surveyor reached on practically the same evidence we are now considering. (See in re Pulehuni, 3 Haw. 239-251.)

Kahua, 20 Haw. 278-286.

POINT 3.

THE SUPREME COURT HELD IN ITS OPINION THAT A SKETCH ATTACHED TO THE ORIGINAL GRANT WHICH CONTAINED A "MEANDER LINE" (R. 43, 49, 53) (ALONG THE DISPUTED BOUNDARY), ADMITTEDLY UNSURVEYED BY TRAVERSE (R. 321), AND WHICH CONTAINED NO INDICATION OF MONUMENTS FIXING SAID "MEANDER LINE" ON THE GROUND, OTHER THAN THE STARTING AND ENDING POINTS (AP. EX. B), CONTROLLED THE DESCRIPTION OF THE LAND CONVEYED, AND WAS SUPERIOR IN EVIDENCE TO THE LANGUAGE OF THE GRANT DESCRIBING THE COURSE BY NATURAL MONUMENT. THIS WAS ERROR BY THE COURT.

The Supreme Court describes the line as a "meander line". (R. 43-49-53.) Newton, government surveyor and witness, testified that there were no monuments on this line (R. 324, 322), that there was no survey by traverse (R. 322). He did not look for any monument. (R. 343-344.) Monsarrat never did go to the top of the pali on that job. (Pali, a precipice; R. 348.) The field book of the survey shows that Monsarrat never left the lower, surveyed boundary not in dispute and never was anywhere on the meandering line. (Terr. Ex. 16.)

The sketch itself was not incorporated into any map then in existence or taken from such a map, but was added to the map by some person unknown after the land had been granted to Meyer. (R. 321, 305-336-339-338.) Brown, in his letter (Ap. Ex. L) refers to "the young man who fills out the patents" in passing the buck for the hashed up description in Grant 3539, and the sketch attached to the grant is by some unknown draftsman. (Newton, R. 336.) The map was a "progressive map", had additions all through the

years (R. 336) without record as to the authority or the draftsman (R. 317, 321, 323, 336, 338). There is no record, and Newton did not know, if the data now appearing on the government map was on the map at the time of the sale or when it was put on. (R. 336, 339.)

A sketch physically attached to a grant, not referred to in the description, cannot control a boundary in defiance of the wording of the description. Natural monuments take precedence over sketches, courses, and distances.

> The natural monument along the entire front is the edge or shore of the sea. This, of course, would control courses, distance and area in the absence of a clearly indicated intention to the contrary (diagram attached to be disregarded).
>
> *Brown v. Spreckels,* 14 Haw. 399-405.

> Where lines are run by a surveyor his real location will always be followed; but where he does not run a line there is no location to be followed.
>
> *Kentucky Union Co. v. Hevner,* 275 S.W. 513.

> Natural monuments will control maps, plats and field notes in the absence of a contrary intention.
>
> 11 *C. J. S.* 605.

> A call for a natural monument, fixed, certain and enduring will generally control a description by reference to maps, plats or field notes.
>
> *Bergeron v. Babin,* 120 So. 384.

A "meander line" is not a boundary.

City of Cedar Rapids v. Marshal, 203 N.W. 932.

"Meander line", whether state or national, is not considered a boundary line.

McLeod v. Reyes, 40 Pac. 2d 839-844.

"Meander lines" are run in surveying fractional portions of the public lands bordering upon navigable waters, not as boundaries of the tract, but for the purpose of defining the sinuosities of the stream.

Seabrook v. Coos Bay Ice Co., 89 P. 417.

A "Meander line" in an official survey is not a line of boundary but, as said in Horne v. Smith, 15 S. Ct. 988, 159 U. S. 40, 40 L. ed. 68, is used as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

Tolleston Club of Chicago v. Lindgren, 77 N.E. 818-820.

A "Meander Line" is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

Whitaker v. McBride, 25 S. Ct. 531, 197 U.S. 510, 49 L. ed. 857;

Hardin v. Jordan, 11 S. Ct. 811, 140 U.S. 380.

A "Meander line" generally contains a call for a natural monument which will usually control over calls for courses and distances.

State v. Armin, Tex. Civ. App., 173 S.W. 2d 503-509.

The principal witness for the government was Newton, the head cadastral engineer of the land office. (R. 223.) He testified solely to identify documents, to matters contained in the records and his opinion of what those matters proved. (R. 318.) He says: "The government map boundary on the disputed line is a sketched line, a meandering line. (R. 325.) It does not define the boundary, for the boundary is the physical location of the pali. (R. 322-323.) Sometimes boundary lines on government maps are not even surveyed." (R. 303.) He believes that Monsarrat made the sketch of Kahanui that was added to the government map after the map was completed because the lettering on the other lands is definitely Monsarrat's printing (R. 303), but the words "land of Kahanui" "could be" his printing and the "Grant to R. W. Meyer" on the sketch is not Monsarrat's (R. 304), and was added after the map was finished. (R. 321.) Lines indicated by dash and two dots indicate surveyed lines. (R. 300, 305, 303.) This disputed line was put in without the dot and dash line some time after the map was completed. (R. 305.) Monsarrat enclosed a "rough sketch" in his letter to Alexander July 31, 1885, Terr. Ex. 7-B (R. 307) which may be the original of the sketch attached to the grant, but at that time Monsarrat "had no survey of it." (R. 307.)

> "Q. A few days later he said 'I show you a sketch of the land I spoke to you about.' That is the land of Kahanui that had been shown him by the kamaainas. That sketch would contain, would it not, the information that he had received

from the kamaainas as to the boundary, the land markers, roughly where those land marks lay?

A. They just say, 'this is a piece of Kahanui and this was down to the gulch,' in the general description. They would not go around if they were passing by. They would have to go and get instruments.

Q. That is the only record we have of kamaainas ever telling Monsarrat, as far as you know, anything about this land. Do you mean the whole boundary of this land was based upon just a casual conversation while he was engaged in another survey?

A. These boundaries of Kahanui would really depend on the determination of the boundaries of the adjacent lands.

Q. The lower boundaries, yes.

A. Where they have already been awarded.

Q. Yes.

A. Then the only remaining part would be the gulch, which would be a natural boundary, and the edge of the pali."

Can there be any doubt from the above, that the disputed line was a meandering line, expressing the information received by the surveyor from kamaainas (old time residents familiar with the land, its place names, and boundaries) with locations recorded in his field book, (Terr. Ex. 16), placing the boundary line through the falls, which he recorded by triangulation, and Waihanau gulch or valley below the falls? Can there be any doubt that the line shown on the sketch, if the sketch was indeed Monsarrat's and not that of some draftsman, is a "Meandering line" without any intent that it should be a restriction on the

description or limit the title? Can there be any excuse in law for adopting the sketch as controlling the description or the "meandering line" of this anonymous sketch as limiting the title?

Where did the Supreme Court of Hawaii get authority for the statement that "His (Monsarrat's) survey and field notes, together with four official government surveys and maps made in accordance with them were filed and registered with the office of the Minister of the Interior in 1886 and since that time have remained public records in the files of the government." The maps in the exhibits on their face show that only one survey, that contained in the Field Book (Terr. Ex. 16), was ever made of any part of the land, and at the time of the grant the disputed land had not been surveyed. (R. 322.) The "four maps" (Terr. Exs. 11, 12, 13, and 14), are all from the same survey and are mere copies of the same one. (R. 313.) In fact, all of the maps purporting to be registered maps of this section are copies of the original.

> "Q. Yes. In other words, as far as Kahanui is concerned, there is one map here, it has been copied into other maps from the authority of this sketch or this map?
>
> A. Based on Monsarrat's map.
>
> Q. All of them?
>
> A. They are all Monsarrat's.
>
> Q. So that actually as the survey and the map of Kahanui, there has been one map copied into a number of maps of various areas, including

Kahanui, but just the one survey and the one map of Kahanui has been used in the copying?

A. That is my belief.

* * * * * * *

Q. The authority, then, for each map for the boundaries is the authority for the first map that was made?" (R. 312-313.)

"Q. Do I understand, Mr. Newton, then, that this Northern and Western boundary is a sketched boundary and not a surveyed boundary of that sketch?

A. Monsarrat did locate certain points along the top edge of the pali, but he did not have enough.

Q. When?

A. When he was down in the valley. (Referring to surveys 7 and 8, dated 1890 and 1895, of the leper settlement, Terr. Exs. 18 and 18-a, which do not show any shots to the disputed boundary.)

Q. He had not located them in 1888, had he?

A. I do not know."

As shown supra, the part of the map that purports to be Kahanui, and which shows the meandering line of the boundary in dispute, is not identified as Monsarrat's work, and is positively declared by Newton to be lettered in handwriting other than Monsarrat's (R. 304) was added to the original map by some unknown person after the map was completed and after the patent was issued. (R. 321.) The Supreme Court of Hawaii never obtained any information that there were official government maps *showing the land of Kahanui* on file in 1888, at the time of the

description, time of the sale, or time of the issuance of the patent, from the record of this case. Certainly not the maps on exhibition, all copied from one original, the original altered since the patent date. (R. 313.) The specific portion of the original showing Kahanui was added by unknown persons after the completion of the map and after the patent date. (R. 317, 321, 338, 336, 339.) Newton, custodian of the records testifies that all records pertaining to this patent have been entered as exhibits in this case. (R. 349.)

The finding, by the Supreme Court of Hawaii, that the sketch on the back of the patent was copied from a map is wholly contrary to the uncontradicted testimony of the government witness that the sketch was entered on the map after the grant was made. (R. 317, 321, 336, 338, 339.) Certainly, there is no evidence, and the Supreme Court did not find, that the parties to the sale of this lele to Meyer ever intended that the meandering line should control the title.

In practically every boundary case decided by the Supreme Corut of Hawaii where a patent was involved there was a sketch attached to the patent. In each of the cases considered, the testimony of witnesses determined the final decision.

Boundaries of Kahua, 20 Haw. 278;
Boundaries of Pulehunui, 4 Haw. 239;
Ookala v. Wilson, 12 Haw. 127;
McCandless v. DuRoi, 23 Haw. 51;
Bishop v. Mahiko, 35 Haw. 608.

> The patent contains a diagram of the land granted. That diagram, with its markings that can be understood as the designation of a gully or holua tends to support the defendants contention that the third course is not erroneously stated in the patent as running NW; but maps or diagrams in patents or deeds, like other elements of description, are to be weighed in comparison with other elements of the description and other facts in the case. Whether such a diagram is to prevail over one or more inconsistent elements, or is to be overcome by such other elements is a question to be determined by the jury under proper instructions from the court.
>
> *Kelekolio v. Onomea,* 29 Haw. 130.

It is to be noted in the above case that the diagram considered there actually marked the location of the gully, as does the sketch in the field book (Terr. Ex. 16) from which the description was taken in the present case, while there is no monument located on the sketch on the patent.

> A map survey and plat which might be in exsitence in any office of the government would not in itself be evidence of a boundary if it had not been incorporated in an award or patent.
>
> *In re Pulehunui,* 4 Haw. 239-251.

A registered map is not primary evidence.

> *Boundary of Kahua,* 20 Haw. 278-286.

Although Mr. Burke had no connection with and personally knew nothing about the making by Mr. Cooley of the alleged 1911 survey, he

was permitted to testify as to his interpretation of the lines and points shown in Exhibit B. Such testimony is valueless as evidence. "A surveyor's testimony is inadmissible except as to data from which he surveys, and testimony as to his location of a boundary line is incompetent where he has no means of verifying his survey" 11 CJS Boundaries, ¶ 107, p. 702.

Vaught v. McClymond, 155 P. 612-618.

The best evidence is the corners actually fixed upon the ground by the government surveyor. In default of which, the field notes and plats come next, unless satisfactory evidence is produced that the course was actually located upon the ground at a point different from that stated in the field notes.

Vaught v. McClymond, 155 P. 620.

As to the official maps in the general land office, they represent nothing more than the draftsman's and commissioner's opinions and conclusions from the records and other available information as to the location of the various surveys with reference one to the other. As additional information is obtained as, for example, from new field notes or reports of surveys or judgments, the maps are corrected and changed, and from time to time it becomes necessary to compile new maps.

Weatherly v. Jackson, 71 S.W. 2d 259-262.

But it is not absolute, as this court has also frequently decided. It will not be applied where, as here, the facts conclusively show that no body of water existed or exists at or near the place

indicated on the plat, *or where, as here, there never was an attempt to survey the land in controversy.* (Italics added.)

Jeems Bayou etc. v. U. S., 260 U.S. 561, 67 L. ed. 402-406.

Citing:

Security Land v. Burns, 193 U.S. 167;
Lee Wilson & Co. v. U. S., 245 U.S. 24;
Producers Oil v. Hanzen, 238 U.S. 325, 338;
Horne v. Smith, 159 U.S. 40;
French Glenn v. Springer, 185 U.S. 47;
Chapman v. St. Francis, 232 U.S. 186.

POINT 4.

THE SUPREME COURT OF HAWAII HELD IN ITS OPINION THAT THE BOUNDARY LINE ADOPTED BY THE TRIAL COURT REQUIRED THAT THE COURSE ADOPTED BY THE TRIAL COURT CONTAIN COURSES IN ADDITION TO THOSE OF THE "MEANDER LINE" AND THUS ALTERED A WRITTEN INSTRUMENT. THIS IS CONTRARY TO THE EVIDENCE, IN THAT THE COURSE ADOPTED PASSES OVER A RIDGE WITHOUT WIDTH WHERE THE TWO VALLEYS JOIN. (AP. EX. A, R. 372.) THIS RULING WAS ERROR BY THE SUPREME COURT OF HAWAII IN THAT UNSURVEYED "MEANDER LINES" ALMOST INVARIABLY REQUIRE MANY COURSES WHEN LAID OUT BY A TRAVERSED SURVEY IDENTIFYING THE LINE ON THE GROUND. (R. 97.) THE ADOPTION OF THE LINE APPROVED BY THE TRIAL COURT DOES NOT REQUIRE ANY COURSE OTHER THAN THOSE LOCATED ON THE NATURAL MONUMENTS DESCRIBED IN THE GRANT, AND WHICH THE "MEANDER LINE" PURPORTED TO FOLLOW; THE FACTUAL EVIDENCE SHOWS THAT THE BOUNDARY OF THE LAND KNOWN AS "WAIHANAU VALLEY" FOLLOWS THE TRIAL COURT'S LINE.

The fact that the two valleys are separated by a hogback ridge without width is shown by the maps

admitted. Ap. Ex. M, Court's Exhibit 1, and Territory's Ex. 1, the mosaic photographs, Terr. Ex. 5-A, all show this feature. Surveyor Towill, who prepared the mosaic map for the appellee, testified:

> "Q. (By Mr. Flynn.) From the examination of the photograph (Exhibits 5 A,B,C,) I note a very considerable distance where your line on the easterly ridge, or that area approximately above the stream, between points Waihanau Falls, S bend in the stream is a single line at each end of which you show an encircled line, apparently to cover broader points of the ridge formation. Am (372) I right?
>
> A. That is right.
>
> Q. Where you have the single line on the photographs?
>
> A. Yes.
>
> Q. On the photographs. Is the ridge formation such where that single line is that the flat line between the edge or edges of the pails so narrow that an encircling or larger line could not be drawn and still lay along the flat land?
>
> A. That is correct. Where the single line appears it is a hogback ridge; there is no flat on top at all."

Mr. Towill, who prepared the photographic mosaic for the government, says that the meaning of the word "pali" is a "precipice". (R. 374.) The "top of the pali" is not a part of the description of the land contained in the description contained in the patent 3437. The words are taken from the description of the Pease survey of Makanalua (Terr. Ex. 9), where the description is qualified as follows: "Thence along the top of the pali *bounding Makanalua gulch or*

ravine." At the point of the big falls there is a precipice or pali extending across the entire depression. (R. 130, 407.) The valley at the point of the big falls is impassable. (R. 130, 165, 378.) The eastern side of the valley above the big falls is a gentle slope, easily traversible, with a series of hard rock benches interrupting the gentle slope in places, a slope of the benches of "from 40 to 50 degrees" (R. 375), all passable to men and animals and crossed by a trail. "Following a pali" is impossible where there is no pali.

> "Pali; (pa'li) n. A precipice; the side of a steep ravine; a steep hill; whatever stands up like a precipice; a cliff." (Andrews Hawaiian Dictionary, p. 524.)

The words "bounding Makanalua gulch or ravine" are just as much a matter of description as the word "pali". (R. 111.) A "gulch" or ravine" is not a gently sloping valley. It is defined by Webster as: "A deep or precipitous cleft, especially the sharply hollowed bed of a torrent; a ravine" and "ravine" is defined as "a depression worn out by running water, larger than a gully, and smaller than a valley, esp. a deep gorge." This definition applies to the portion of Waihanau so identified below the falls. The line of the description adopted by the trial court follows this precipice across the box canyon up the steep and untraversable walls of the two ridges on either side of the falls (R. 165, 407) to the point where the two valleys join at the ridge without width and constitute an unbroken traverse of the "pali that bounds

Makanalua gulch or ravine'' and the meander line that shows the ''head of Waihanau and Waialeia valleys'' thus joined.

The ''high peak'' which is a part of the Makanalua description, does not exist. (R. 120.) ''A small mound or hill''. (R. 372.) There is no ''high Mountain peak'' anywhere in the vicinity, as shown by the mosaic map (Terr. Ex. 1), McKeague's map (Ap. Ex. 1, Court's Ex. 1), the stereoscopic photographs (Terr. Ex. 5-A-B-C), and the photograph of the big falls (Terr. Ex. 17). McKeague testified that the point claimed by the government to be the ''mountain peak called Kaulahuki is a flat, grassy mound, not appreciably higher than the rest of the valley walls. (R. 130.) Several witnesses testified (supra) that the name ''Kaulahuki'' is the name of the big falls. (McKeague, Ernest Meyer, Tuitele, Penn Meyer, William Meyer.) Pease's description is a government exhibit. The absence of any high mountain peak in the vicinity and the fact that Pease never went there strengthens the presumption that the description of Kaulahuki as a ''mountain peak'' is erroneous.

The line adopted by the Supreme Court, from the map and without any factual evidence of the ground locations of the monument the meander line purports to follow, does not follow a precipice above the big falls. The precipice ends at the big falls and the valley above is not so bounded. There is a path leading down the westerly valley slope, the slope may be traversed at almost any place. (R. 215.) ''When we used

to drive cattle some of them used to break away from up above and hide in the woods * * * When we would go hunting, we would cross anywhere we wanted." (R. 218.) Where the line crosses the valley there is no pali or precipice, no "Pali bounding Makanalua gulch or ravine." No gulch, no ravine, no authority in the description to leave the "head of the valley" and cross the stream. This actually requires a new course in the description, "thence down the ridge to the stream, across the stream, and up the slope on the far side", which is not required where the line adopted by the trial court follows a line of precipice all the way to where the boundries of the valleys join. See mosaic map Terr. Ex. 1, Photograph s Terr. Ex. 5 A-B-C.

The easterly slope, likewise has no pali. It is a gentle slope with rock outcroppings ten to forty feet high, forming steep places which are traversable, 40 to 50 degrees in slope. (R. 375.) This gentle slope follows back to the place where the pali bounding the ridge on the west side of the falls joins the steep precipice of Waialeia Valley. (Mosaic map, Terr. Ex. 1.) The line described by Meyer in his letter to Thurston of October 23, 1889 (Ap. Ex. I-2), as that which would "save some fencing." No fencing can be saved by adopting the government line. Meyer fenced off the boundaries of his land where the cattle could stray ((R. 171), but placed no fences along the government line, although he drove his cattle through there and there was nothing to keep them from straying. (R. 171, 176, 200, 213, 217.)

POINT 5.

THE SUPREME COURT OF HAWAII HELD THAT THERE WAS A "VAST RESERVOIR" OF MAPS IN GOVERNMENTAL FILES WHICH SHOWED AND CONTROLLED THE BOUNDARY. (R. 47.) THIS IS CONTRARY TO THE EVIDENCE IN THAT THE GOVERNMENT WITNESSES TESTIFIED THAT ALL THE MAPS WERE COPIES OF THE FIRST IN VARYING SCALES (1) (R. 311, 312, 323, 324), WITHOUT ADDITIONAL SURVEYS; (2) (R. 312, 313, 319, 324), SO THAT THERE WAS BUT ONE MAP, IF ANY, OF EVIDENTIARY VALUE; (3) (R. 312, 313, 319, 338, 339). THIS MAP WAS A "PROGRESSIVE MAP"; (4) (R. 317, 318, 303) WITH THE SKETCH OF THE LAND UNDER LITIGATION ADDED AFTER THE GRANT; (5) (R. 317, 318, 303, 304, 323, 334, 336, 339) WITHOUT ANY SURVEY OR FACTUAL LOCATION OF THE LINE ALONG THE DISPUTED BOUNDARY; (6) (R. 303, 305, 307, 311, 312, 319, 321, 322, 334), THAT THERE NEVER HAD BEEN A SURVEY OF THAT BOUNDARY UNTIL THE APPLICANT HAD IT SURVEYED FOR THIS ACTION; (7) (R. 319, 394), THAT THERE WAS NO RECORD AS TO THE IDENTITY OF THE PERSON WHO DRAFTED THE SKETCH ON THE ORIGINAL MAP; (8) (R. 334, 335, 336, 337, 338, 339) AND THAT MANY ADDITIONS HAD BEEN MADE BY VARIOUS PARTIES UNKNOWN SINCE THE MAP WAS FIRST MADE AND NO WAY EXISTED TO DETERMINE WHAT WAS ON ANY GOVERNMENT MAP AT THE TIME OF THE GRANT; (9) (R. 304, 310, 317, 318, 319, 320, 323, 336, 338, 394). IT WAS ERROR IN THE SUPREME COURT OF HAWAII TO ADOPT OR CONSIDER THESE MAP COPIES AS HAVING ADDITIONAL WEIGHT, IF ANY, BY VIRTUE OF THE DUPLICATION. (I HAVE COPIED INTO THE APPENDIX AT PAGE iii THE TESTIMONY REFERRED TO ABOVE. THE FIGURES IN PARENTHESIS REFERS TO NOTES IN THE APPENDIX.)

The maps were introduced "for what they were worth" under the procedure of the Land Court which calls for all documents purporting to show matters of title to be admitted. It is the contention of the appellee, adopted by the Supreme Court of Hawaii, that these maps, embodying the "meander line" sketch appearing on the modern versions intro-

duced, control absolutely the boundary line. (R. 47.) This control is exercised by scaling off the meander line by office triangulation and reproducing it on maps of the government witness Newton, adopting such points of Monsarrat's "flag stations" as may, on the office copy, appear near the line as run, whether those points appear on the sketch of the boundary in the field book or not. Point "k", adopted by the government was unknown to Monsarrat at the time of making the field book sketch and was located as a triangulation point later in the book, but never visited and ignored as a monument by Newton in making his map. (R. 343.) Point "a" was never visited by Monsarrat, and "Waiau Falls," written in by some person unknown, can neither be seen from the surveyed line or anywhere Monsarrat is known to have been, but was actually unknown to Newton, although he claims it as a monument.

> There is in the office of the department a map and survey notes on a separate paper taken to refer to it. We have no information whether he was the surveyor or copied what was in his handwriting. Nor have we any knowledge on which the survey was made (249). A survey and plot which might be in existence in any office of the government would not itself be evidence of a boundary if it had not been incorporated in an award or patent.
>
> *Boundaries of Pulehunui,* 4 Haw. 239, 250, 251.

> The rule that a government plat rules is not followed where there never was any attempt to survey the lands in question.
>
> *Jeems Bayou etc. v. U. S.,* 260 U.S. 561, 67 L. ed. 402.

But it is not absolute, as this court has frequently decided. It will not be applied where, as here, the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat or *where as here, there never was an attempt to survey the land in question.* (Italics ours.)

Jeems Bayou (supra).

A map means not only a delineation of the land giving a general idea of the land taken, but also such full and accurate notes and data as are necessary to furnish complete means of identifying and ascertaining the precise position of every part, with courses and distances, so that every part can be found.

Hollister v. State, 77 P. 339, 9 Idaho, 657.

So that the making of a map of an addition implies that the addition had been surveyed, and that such survey was marked on the ground so that the streets, blocks and lots can be identified.

Burke v. McCowen, 47 P. 367-368, 115 Cal. 481.

Registered map 939 of the survey department of the Territory includes the outlines of the land Kahua * * * It is simply the conclusions of the government surveyor reached on practically the same evidence that we are now considering. See Re Boundaries of Pulehunui, 4 Haw. 239-251. Even though admissible, we deem it insufficient to counteract the showing of the Pelham plat and grant.

Boundaries of Kahua, 20 Haw. 278-286.

A call for a natural monument, fixed, certain and enduring will generally control a description by reference to maps, plats or field notes.

Bergeron v. Babin, 120 So. 384, 167 La. 833.

POINT 6.

THE ADVERTISEMENT BY WHICH THIS LAND WAS SOLD BY THE GOVERNMENT OF HAWAII TO THE PREDECESSOR IN INTEREST OF THE APPLICANT, DESCRIBED THE LAND AS BEING THE WHOLE OF THE LELE OF KAHANUI (AP. EX. D1), IN ACCORDANCE WITH A DESCRIPTION ON FILE (TERR. EX. 19), WHICH IS IN EVIDENCE, AND WHICH DOES NOT REFER TO ANY MAP OR OTHER LIMITATION ON THE DESCRIPTION. THE GOVERNMENT OFFICIALS ADMIT THE INTENT TO CONVEY THE WHOLE OF THE LELE ACCORDING TO ITS ANCIENT BOUNDARIES IN THE CORRESPONDENCE IN EVIDENCE. IF THE ACTUAL LOCATION ON THE GROUND OF THE LIMITS OF THE WAIHANAU VALLEY HAD NOT BEEN ESTABLISHED BY UNCONTRADICTED TESTIMONY IN ACCORDANCE WITH THE FINDING OF THE TRIAL COURT, THE EVIDENCE OF THE INTENT OF THE PARTIES, AS SHOWN BY THIS GOVERNMENT EVIDENCE, WOULD HAVE BEEN BINDING ON THE COURT AS FIXING THE LINE ON THE ANCIENT BOUNDARIES, AS SHOWN BY TESTIMONY OF THE WITNESSES AND THE SURVEY OF ADJOINING LAND BY PEASE, OFFERED BY THE RESPONDENT. AS IT STANDS, THE EVIDENCE OF ANCIENT BOUNDARIES SUBSTANTIATES THE TESTIMONY OF THE LOCATION OF THAT MONUMENT. IT WAS ERROR FOR THE SUPREME COURT OF HAWAII TO HOLD SUCH EVIDENCE INADMISSIBLE IN THE FACE OF THE UNCONTRADICTED FACTUAL TESTIMONY IT CONFIRMED.

Sections 42, 43, 44, 45 of the laws of Hawaii, 1884, which were in effect at the time of the grant, provide for a "survey" of all lands to be sold by the Minister of the Interior. But Section 45 makes it optional to

map lands. (Appendix, page iii.) In accordance with this provision, Meyer adopted the "survey" of Monsarrat, which was made up of a surveyed by traverse lower boundary, and a description by monument of the northern and easterly boundaries. The boundary adopted was the line of high, impassable cliffs that wall off the lepers from the outside world beginning at the sea and continuing around the whole district of segregation. (See maps.) The whole of this boundary constitutes the survey of the leper colony itself as described by Pease (Terr. Ex. 9), which was incorporated into the deed by which the government obtained title to the adjoining land of Makanalua in the leper settlement.

The "survey" was the description furnished by Meyer in his application to purchase the land. (Terr. Ex. 19.) Meyer was responsible for the accuracy of that survey description. He also had a right to rely upon the description as defining the land he bought at public auction. This description (Terr. Ex. 19) has no mention of a map or sketch. It adopts no map. It is the sole requirement of legality of the sale, limiting the powers of the Minister of the Interior, and, as such, fulfilled that requirement. No map is called for in the law (Section 42, Comp. Laws of Hawaii, 1884; Appendix, page i.) The practice of the survey and land departments in issuing patents was the same as the United States Land Office practice, that is, that there was attached to the patent a plat showing the approximate size and shape of the land for the purpose of showing the acreage. These plats ap-

pear in almost every boundary case in the Hawaiian reports. They have been universally disregarded in favor of oral testimony fixing the lines on the ground.

The correspondence between the original parties, Meyer and the government officials unqualifiedly shows the intent of both parties that the whole of the lele should be sold at the auction and transferred to the purchaser (Applicant's Ex. C-1A, C-1B, C-1C, E, F. G. H. I-i, I-2, and P.) This intent controls the interpretation of all calls. (*Levy v. Lowell,* 24 Haw. 716-719.) If there is a doubt as to the location of any monument, the intent of the parties prevails. This intent was to convey according to a well known and existing boundary which happened to be also the ancient boundary of the lele, the "head of Waihanau valley". The evidence of ancient boundaries which the Supreme Court of Hawaii rejected corroborates the known location of this line on the ground. It is part of the impassable cliff above which the lepers could not climb. It was outside of the land of Waihanau which Meyer rejected as his choice because the land of Waihanau had been overrun by lepers, which was not the case of the land above the falls; it was at the place called Kaulahuki, where the surveyed boundary of the land of Makanalua ended; and it was on the land occupied by Meyer under claim by ancient boundaries which he thought was his and which he applied to buy.

> We are impressed that this line is a natural and probable one and that it is such adds weight to the testimony given for it.
>
> *In re Pulehunui,* 4 Haw. 239, 254.

POINT 7.

IT WAS ERROR FOR THE SUPREME COURT OF HAWAII TO DISREGARD THE FIELD NOTES OF THE SURVEYOR WHO WROTE THE DESCRIPTION FOR THE GRANT, WHICH, BY SKETCH SHOWN ON PAGE 112 OF THE FIELD BOOK (TERR. EX. 16), LOCATES THE LINE OF THE BOUNDARY PASSING THROUGH THE BIG WATERFALL, AND LOCATES THE WAIHANAU GULCH BELOW THE FALLS.

The field notes of a survey, recorded in the official field book, and filed with the Survey Department according to law, constitute the primary, basic evidence of what was done by the surveyor in making his survey and, equally, what the surveyor did not do.

> When reference is made in the decisions to the intention of the surveyor, the purpose deduced from what he did in making the survey and description is meant, and not one which has not found expression in his acts.
>
> Insofar as the field notes govern an area conveyed, that inquiry is not what the surveyor intended to do but, if it can be determined, what he actually did.
>
> *Blake v. Pure Oil,* 100 S.W. 2d 1009.

> When a patent is based on a survey, the actual footsteps of the surveyor are binding and must be followed.
>
> *Outlaw v. Gulf,* 137 S.W. 2d 787-94.

There is no authority for the assumption that the surveyor did anything not recorded in the field book, for it is his duty to so record his every act from which the authority for his later maps may be drawn. Monuments which appear as controlling lines of boundary are the monuments which he has located

and noted in his field book. If he has located a waterfall, noted it in his field book, sketched it in his locating sketch as being the boundary, the waterfall so used is the waterfall identified in his field book and no other. Monsarrat located the big falls as a waterfall, the only one located in his field book or shown on the sketch therein. (R. 347-348.) This cannot now be shown to be a different waterfall, "Waiau Falls", entered in pencil on later maps in an unknown handwriting, and invisible to any point known to have been visited by Monsarrat. (R. 344.)

The justices of the Supreme Court of Hawaii were offered the sketch in the original field book, not the photostat, and examined that sketch while listening to argument on the writ of error. It is not mentioned in the decision. During the trial Newton, government surveyor, and principal witness, testified that the waterfall in the sketch was a landmark located on the boundary of Kahanui. "It is on page 112 of Field Book 359. Monsarrat has a sketch of the land of Kahanui and just below Point A he has, at the bottom of the valley, or the stream there, he has the word 'fall' indicated in red on the sketch. It does not say 'Waiau Falls', but, he says, shows a fall there. Just where it crosses the boundary, sketched as crossing the stream. That is, there was a waterfall there at least. It proves to me that the result of Monsarrat's work, he put it in a 'Waiau Falls', where it crosses the stream. His map shows that." (R. 311.)

This testimony of Newton, recanted later, was a deliberate falsehood. His later testimony on cross-

examination, denies that this sketch is a sketch showing the boundary line of Kahanui, when he said that the line went through the waterfall. "It happens to go through the waterfall" (R. 330) and "It is not, to my knowledge of surveying, what this sketch actually shows. This is merely a direct bearing and distance between two points" (R. 330). There he lied again, clumsily, for an examination of the sketch, disregarding his sworn testimony ante that this was a sketch of Kahanui and that the line through the waterfall was the boundary, shows that the line goes through three points, Kaohu, Point X, and thence to Kaluahauoni. (Terr. Ex. 16, p. 112.) Definite bearings were taken from both of the first points, showing them to be situated widely apart. (Terr. Ex. 16, pp. 109-111.) A single line could not be a direct line from both points. Newton later says, in answer to a question if Monsarrat ever saw "Waiau Falls", that Monsarrat did not, and that he himself did not know where Waiau Falls was. (R. 345.) He did not look for any monuments on the disputed line because it did not call for monuments and he was just making a general location himself. (R. 313, 343.) The penciled "Waiau Falls" appearing on the map is not Monsarrat's handwriting.

Certainly, if Newton had gotten by with his first testimony that the sketch in the field book showed the line going over a waterfall, and that waterfall was named by Monsarrat in his field book as "Waiau Falls", the testimony would have been overwhelming for the appellee. As it is, the book speaks for itself

and for Monsarrat. It is his record of what he did. He shot the big falls. He examined kamaainas who told him the landmarks, and the names of the landmarks controlling the boundary. He recorded the information in his field book, probably showed the data to his fellow surveyor Meyer, and had the description made from his recorded data. In it there in black and white for all the world to see. Page 109, a waterfall bearing 297 degrees, 28 minutes from Kaohu, page 111, a waterfall, the same fall, bearing 297 degrees, 20 minutes, 30 seconds from point Y. Kaluahauoni from Kaohu, 287 degrees, 44 minutes, from point X. "Cross on rock." 280 degrees, 49 minutes. The valley or gulch closed in at the waterfall by hashure marks and widening again above, and the location of "Waihanau gulch" written in below the fall. It is also there to see that at no time did Monsarrat ever traverse the disputed line. (R. 305, 307, 308, 313.)

POINT 8.

IT WAS ERROR FOR THE SUPREME COURT OF HAWAII TO DIRECT THE TRIAL COURT TO AMEND THE DECREE BY SUBSTITUTING THE LINE OF BOUNDARY CLAIMED BY THE GOVERNMENT FOR THAT IN THE DECREE WHEN THERE WAS ABSOLUTELY NO EVIDENCE OFFERED BY THE GOVERNMENT BY PERSONS FAMILIAR WITH THE MONUMENT NAMED LOCATING THAT LINE OR MONUMENT ON THE GROUND.

The location of a boundary line on the ground, which was the only issue before any court in this case, is a question of fact, not law, to be determined on

oral and extrinsic evidence of fact, from which is excluded opinion testimony of surveyors and others concerning the location of monuments described in the description.

What are boundaries is a question of law and where they are is a question of fact.

Kelekolio v. Onomea, 29 Haw. 130;

McCandless v. DuRoi, 23 Haw. 51.

The identity of a monument found on the ground with one referred to in a deed is a question for a jury.

McCausland v. York, 174 A. 383.

Where there is a dispute concerning the location of natural objects called for in a grant or deed, and the evidence is conflicting or where the evidence tends to show two or more natural objects that may answer the description, the boundaries must be determined by the jury under the court's instructions.

Parran v. Wilson, 154 A. 449.

Natural objects called for in grant may be proved by testimony not found in grant but consistent with it.

Blake v. Dougherty, 5 Wheat. (U.S.) 359.

Opinion testimony of Surveyors is inadmissible to prove ground location of a boundary.

11 *C. J. S.* 701, Par. 107;

8 *Am. Jur.* 811.

Generally, reputation or tradition is admissible to prove ancient boundaries.

11 *C. J. S.* 698, Par. 106.

There is a distinction between *hearsay and evidence by reputation,* the latter being competent as to ancient boundaries, the former in case of declaration of deceased persons as to boundaries of more recent origin.

Corbett v. Hawes, 122 S.E. 478, 187 N.C. 653.

Family traditions are admissible as to a boundary, but are not to prove or disprove a title.

Boyd v. Ducktown Chem. (Tenn. App.), 89 S.W. 2d 360.

The rule now generally established in the United States, however, is that evidence of comman repute is admissible as the location of private as well as public boundary line.

Ellicott v. Pearl, 10 Pet. (U.S.) 412, 9 L. ed. 475.

If a public boundary, such as a county line, is the dividing line between two lots, any evidence tending to prove the proper location of the public boundary is relevant as to where the private division line should be located. Accordingly, it has been held that facts as to use and occupancy of other tracts by neighboring owners of land as to their erecting a fence and treating it as the county line for many years may be admitted in evidence in such dispute between owners of adjacent lands.

8 *Am. Jur.* 813, par. 95.

We use the word "kamaaina" above without translation in our investigation of ancient boundaries, water rights, etc. A good definition of it would be to say that it indicates such a person

as the above witness describes himself to be, a person familiar from childhood with any locality.

Pulehunui, 4 Haw. 239, 245.

A map survey and plat which might be in existence in any office of the government would not in itself be evidence of a boundary if it had not been incorporated in an award or patent.

Pulehunui, 4 Haw. 239, 251.

Declarations of deceased persons, disinterested at the time, in respect to boundary lines and corners, are admissible.

Boardman v. Reed, 6 Pet. (U.S.) 328, 8 L. ed. 415;

Annotation, 94 *Am. St. Rep.* 678;

134 *Am. St. Rep.* 619.

The declarations of a deceased former owner are admissible in evidence, but in order to be admitted, they must establish some fact as a corner stone or particular marked line.

Cadwalader v. Price, 111 Md. 310;

Annotation, 94 *Am. St. Rep.* 681.

Thus, the true locations of boundaries may be shown by parol evidence, under the well established rule of law that such evidence is always admissible to apply a writing to its subject, and, therefore, to identify monuments called for in descriptions of tracts of lands contained in patents and deeds.

Hooten v. Comerford, 152 Mass. 591;

Annotation, 6 *L.R.A.* (N.S.) 958;

Brown v. Huger, 21 U.S. 305, 16 L. ed. 125;
Blake v. Dougherty, 5 Wheat. (U.S.) 359, 5 L. ed. 109;
Holmes v. Trout, 7 Pet. (U.S.) 171, 8 L. ed. 644.

Where a description of premises is to be interpreted, the distinction seems sound and simple that if a witness (usually a surveyor) is attempting merely to construe the untechnical terms of a deed, map, or the like, his testimony is unnecessary and improper: * * *
Wigmore, 3rd Ed., par. 1956.

Where lines are run by a surveyor his real location will always be followed; but where he does not run a line there is no location to be followed.
Kentucky Union Co. v. Hevner, 275 S.W. 513; 11 *C.J.S.* 605.

A call for a natural monument, fixed, certain and enduring, will generally control a description by reference to maps, plats, or field notes.
Bergeron v. Babin, 120 So. 384, 167 La. 833.

The Land Court of Hawaii is a statutory court created to determine land titles according to the Torrens system. There are two appeals from its rulings; to the Circuit Court sitting with a jury for the retrial of the facts as certified by the Land Court (Section 12633), which is the only retrial of the facts permitted, unless a new trial shall be granted accord-

ing to law. "After the trial in the circuit court there shall be no further trial of any issue of fact unless a new trial shall be granted according to law." (Last paragraph of Section 12633.) An appeal on writ of error lies to the Supreme Court of Hawaii on questions of law only. (Section 12635.)

The only question of issue was a question of fact. The Supreme Court, acting on writ of error, could pass upon questions of law raised by the specifications of error, but had no power to review the weight of evidence, or to order a verdict or decree on the facts.

The Supreme Court of Hawaii went on to elaborate its conclusions as to the boundary without benefit of evidence in a discussion of the topography involved. The basic error involved is, of course, the assumption that "Waihanau Valley" is the name of an entire watershed and that the "head" of the valley can be designated anywhere along its length. The valley involved runs as a watershed several miles above either line. (R. 399.) The maps show that above the line claimed by the government, the stream branches out and is shown indefinitely beyond the boundaries of Kahanui. R. 397.) The definition adopted by the Supreme Court of the "head" of a valley is "a line of curvature with its apex at the topmost part of the upper end of the valley". (R. 50.) This would be miles above, at the head of the stream. Certainly it cannot apply to a line crossing the depression at any other point. But "Waihanau" is shown by the evidence to be

a local name, not of the whole valley, but of a part arbitrarily so called. (R. 397.) Jorgensen says, for the government, that the head of a valley is where it is closed off, as by a waterfall, or other impassable object, if it does not go to the limits of the watershed. (R. 386.) In this connection, Monsarrat was surveying land below the big falls at Ilole when the boundaries were pointed out to him. (Letters May, 1885, to Alexander, and July 17, 1885, to Alexander, Terr. Exs. 6 and 7-A.) From there the visible part of Waihanau valley extends only to the big falls with some background not containing any part of the government line. (Photo, Terr. Ex. 17.) He was there when the kamaainas said that the boundary was the head of Waihanau Valley. From that aspect, the head can only be the impassable falls which he shot first on August 21, 1885. (Field book, Terr. Ex. 16, and verified August 24, 1885.) He never left the ridge along the surveyed boundary as shown by the field book. (R. 344, 305.) He could not have known of Waiau Falls for they are invisible from the ridge. (R. 344. He erected no monuments on the disputed boundary and Newton did not even look for monuments on that line, knowing that Monsarrat never had been there. (R. 343.) Monsarrat put on his sketch every bearing he used to fix the boundary. The Supreme Court says that he marked the letter "k" on the boundary to mark the line, but his field book shows that the flag station K was not shot until August 30, 1885, from Kauna Gulch station, page 142 of the field book, and was not recorded as a monument in the field book or

located on the sketch on page 112. Newton looked for none there, knowing none was called for. (R. 343.) The court overlooks the fact that the sketch attached to the patent was added to the map after the map was completed (R. 336) by some unknown draftsman (R. 321, 338), and that this draftsman copied exactly the sketch on the patent, not so marked, is not shown to have controlled that sketch by points which may have existed on the map for drafting purposes. Especially by point K. There was no monument at K. (R. 343.) Nothing but some object undescribed that made a flag point to be shot and triangled in from Kauna Gulch and Kaluahauoni for the future identification of these points. The sketch accompanying the day's work on August 30, 1885, from Kauna Gulch, page 142, shows a clear view down the valley, past the "S" curve claimed by the government as blocking the valley, lining in K and Kauna Gulch.

None of the points described appear in the sketch attached to the grant. If that sketch is a true copy of a government map no data appears on it to that effect, and the government "map" cannot be presumed to have contained any more data than the sketch. No map is referred to by the sketch, certainly not the map into which the sketch was afterwards copied. This data is the identification of the triangulation stations at Kaluahauoni and Kaeo without another indicated, measured, or described point on the entire boundary. Certainly there is nothing that would permit the owner to determine any point on the boundary by reference to the topography. To say that by this

indefinite sketch the title was limited to the meander lines of its boundaries in spite of the description is beyond any stretch of legal decisions. This is plainly one of those sketches described in the decisions where the meander line was drawn to show the acreage to be paid for and not to limit the title. In view of the fact that Meyer furnished the description, made his upset bid by mail, and never was informed that there was a map in existence, if there was, how can the sketch, without scale, monuments, topographic features, directions or survey data limit his purchase?

POINT 9.

IT WAS ERROR FOR THE SUPREME COURT OF HAWAII TO REVERSE A DECREE OF THE TRIAL COURT FOUNDED ON SUBSTANTIAL EVIDENCE BY A RECONSIDERATION OF THE WEIGHT, IF ANY, OF THE EVIDENCE OFFERED BY THE GOVERNMENT AND TO TRY, DE NOVO, THE ISSUE DECIDED BY THE COURT BELOW.

The trial court was limited by the stipulation to determining a question of fact, not of law. The location of the line on the ground is always a question of fact for determination by jury or by the court sitting without a jury. (*Fentress v. Pokahontas,* 60 S.E. 633.)

After the trial of a question of fact in the Land Court there is an appeal on factual issues to a jury in the Circuit Court upon certified issues forwarded by the Land Court, and excluding all other issues. (R. Laws of Hawaii, 1945, Section 12633.) "After the trial in the circuit court there shall be no further

trial of any issue of fact unless a new trial shall be granted according to law." (Section 12633, R. L. Hawaii, 1945, supra.) This section accents a difference in procedure between hearings by the Supreme Court on writs of error from the Land Court and writs of error in other courts. The limitation on retrials of issues of fact determined by Land Court procedure restricts the Supreme Court regardless of its jurisdiction over writs of error from other courts. The Supreme Court of Hawaii is given no jurisdiction by the statute to act in the determination of factual issues by trial *de novo,* or by considering the weight of evidence. The consideration of the evidence includes such matters as the examination of the exhibits other than for the purpose of adjudging the legality of their admission, weighing the opinion testimony of surveyors on the paper location of lines marked by monument unknown to the surveyors, or by mathematical process, or ruling on the intent of the parties as disclosed by lawful evidence.

In pursuing its study of the evidence to reach its own conclusion as to the facts, the Supreme Court disregarded all of the evidence of persons knowing the exact location of "Waihanau Valley", and disregarded the location of that boundary because the witnesses located it by natural physical features, on the ground that the natural features were not part of the description (R. 55), dismissing it as being associated with an imagined theory of the trial court that the grant was a grant by ancient boundaries. (R. 44.) "The underlying theory of the land courts find-

ing that the intent was to convey, not according to surveyed descriptions, based upon existing government surveys and maps, but according to ancient boundaries in disregard of those descriptions." This statement is evolved from thin air. No such theory or fact is contained in the trial court's decision. The issue before the court was the determination of the location *on the ground* of a line described as "the head of the Waihanau valley". The surveyor who wrote the description took his language from kamaainas for a location well known from ancient times. (Terr. Exs. 6 and 7-B.) The advertisement for the sale of the land described it as the lele or remnant of Kahanui, as known by ancient boundaries. (Ap. Ex. D-1.) The deeds by which Meyer first came into claim of title to the land described the land by ancient boundaries. (Ap. Ex. S-T.) The letters of Monsarrat and Thurston to Meyer acknowledge that the whole of the lele was intended to be conveyed according to the description of the land filed by Meyer. The description of the land required to be filed and on exhibition in the office of the Minister of the Interior was that furnished by Meyer, containing no map. (Terr. Ex. 19.) It is the location on the ground of this ancient, well-known monument that was before the court. The only reference to the award of this land by ancient boundaries by the trial court was in connection with the first award of the ahupuaas of Kahanui and Makanalua by name only, and the establishing then of the ancient boundaries as the limits of the ahupuaas, and the persuasive effect on

the present issue of the location of the named natural monument according to the description anciently known, of the course at the time. (R. 31.) Nowhere in the whole decision and decree of the trial court was ever any decision or theory that Grant 3437 was an award by name, as asserted by the Supreme Court. There can be no dispute that a purchaser at an auction which describes the lands as being the whole of a parcel, is entitled to an interpretation of courses named which will effectuate the intent and comply with the auction offer.

The ancient kamaainas who furnished that description to Monsarrat were so definite in the location of the line that Mansarrat triangulated the big falls, definitely located them and entered them in his field book as being the boundary. (Terr. Ex. 16, page 112.) He then located and sketched in the Waihanau Valley *below the falls.* This is the description and action of the surveyor contended for by the government in its evidence, that the "water fall" indicated was "Waiau falls" on the boundary until forced to acknowledge that "Waiau falls" is invisible from any place Monsarrat is known to have been, does not appear in any field notes, was unknown even to Newton, and is a mere 20 feet high, of such a slope that men can climb directly over and around it. (R. 400.) When Newton testified that a solid line with names shown on both sides is a boundary line, he knew that the solid line in the field book sketch indicated a boundary line, and so testified (R. 301, 311):

"A. It is on page 112 of Field Book 359. Monsarrat has a *sketch of the land of Kahanui* and just below Point A he has, at the bottom of the valley, of the stream there, he has the word 'fall' indicated in red in the sketch. It does not say 'Waiau Falls', but, he says, shows a fall there. Just where it crossed the *boundary,* sketched as crossing the stream. That is, there was a waterfall there at least. It proves to me that the result of Monsarrat's work, he put it in as 'Waiau Falls' where it crosses the stream. His map shows that."

(R. 327):

"A. He located that point. Yes, he located the waterfall *to show it on his map,* but when he actually wrote his description he said it ran along the pali."

But Monsarrat said no such thing, actually, the description in the patent is "from a stone marked with a cross at the edge of Waihanau Valley, thence around the head of the Waihanau (valleys) and Waialeia valley." Never a word of following the pali once the "stone marked with a cross" is reached, but "thence around the head of Waihanau valley" wherever that "head" was known to be. (Ap. Ex. B.) Newton then attempts to retract his former statement that the sketch is a sketch of Kahanui, and that the line is the boundary, but says "this is merely a direct bearing between two points". (R. 330.) There again he trips. The line referred to has located on it in a straight line the stations "Kaohu" and "x" the cross on rock, two points offset from the direct line to

either by a considerable distance, as shown by the completed survey of this line by traverse. It could not possibly be a direction line to either and contain both. Further, Newton testified that direction lines were dotted lines. (R. 296.)

The original of that field book, opened at page 112, was examined by the justices of the Supreme Court at the argument of this case and no mention of the original work of Monsarrat as shown by his field notes is commented upon in the decision, no mention of the location of the waterfall by triangulation on the boundary, no mention of the sketch showing the location of Waihanau Valley below the falls, and no comment, but a complete acceptance by the court of Newton as an authority in locating a monument in a neighborhood strange to him, that he never knew, made no search for, and was incompetent to describe.

The court says that the trial court found that the intent was to convey "not according to surveyed descriptions". What surveyed descriptions? The line is admitted to be a "meander line" (R. 43, 49, 53, 52), a "sketched boundary" (R. 314). Monsarrat's field book is a record of what he did, and also a record of what he did not do, and definitely, he never traversed the disputed boundary, never surveyed the monument described, made no locations on the line of the pali, even, on the disputed boundary, but shot some flag stations several years later on the undisputed boundary "Waialeia Valley". (Terr. Exs. 18 and 18-A.) Monsarrat's survey was the only survey purporting to describe this land and all the records of the survey

office pertaining to this boundary are on file as exhibits in this case. (R. 349.)

The Supreme Court says that these "surveyed" descriptions were based on "existing government surveys and maps" always referring to the disputed area. There were no traversed surveys. (R. 314, 319, 322.) What about maps:

> The decisions of the Land Department assuming to fit the boundary in accordance with such surveys are not admissible as evidence.
>
> *U. S. v. State Investment,* 264 U.S. 206, 68 L. ed. 639.

> While the plat and survey may not be impeached in an action at law, facts and circumstances may be examined to determine the real intent of the grant as a whole, and if it affirmatively appears that the monuments shown on the plat or by field notes were erroneous or mistaken or that there was an intent that a certain boundary should be actually fixed the description of which would ordinarily have been construed otherwise, the boundaries actually intended by the grant shall prevail.
>
> *Horne v. Smith,* 159 U.S. 40, 40 L. ed. 68.

> Testimony of a surveyor is incompetent when he locates the line wholly from an ancient map which is not proved to be correct and which does not agree with another map of the same date.
>
> *Carpenter v. Fisher,* 43 N.Y.S. 418, 12 App. Div. 622.

> A surveyor is confined to questions of fact and cannot give as testimony conclusions of fact or

of law which are for the determination of the jury or the court.

Benten v. Montgomery Lumber Co., 142 S.E. 229.

Bounds and starting points are questions of fact to be determined by testimony, and surveyors have no more authority than other men to determine them upon their own motives.

Radford v. Johnson, 8 N.D. 182, 184.

Surveyors should be confined to statements of facts, and not to express conclusions or presumptions.

Clarke v. Case, 144 Mich. 148, 150.

Whether a survey was actually located on the ground or was an office survey is a matter on which the surveyor should not be allowed to express an opinion, but should be determined by the jury, from all the facts in evidence.

Reast v. Donald, 84 Tex. 648.

It is not his business to decide questions of law or to pass upon facts which belong to the tribunal dealing with the facts.

Jones v. Lee, 77 Mich. 35, 43;

Northumberland Coal v. Clement, 95 Penn. 126;

Virginia Coal Co. v. Ison, 114 Va. 144, 150.

We are to remember, then, that a document purporting to be a map, picture or diagram, is, for evidential purposes simply nothing, except so far as it has a human being's credit to support

it. It is a mere waste paper, testimonial nonentity. It speaks to us no more than a stick or stone. It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony or it is nothing. * * * But whenever such a document is offered as proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier.

Two consequences plainly follow. On the one hand, the mere picture or map itself cannot be received except as a non-verbal expression of the testimony of some witness competent to speak of the facts represented.

Wigmore, 3rd ed., par. 791, p. 174.

The map or diagram, as testimony, must come in on the credit of some witness: yet this witness need not always be in court and testifying; for, by exceptions to the hearsay rule, a map * * * may be received on certain conditions, the document must be authenticated as genuinely the work of the person purporting to make it.

Wigmore, 3rd ed., par. 791, pp. 176-77.

Registered map 939 of the survey department of the Territory includes the outlines of the land of Kahua * * * it is simply the conclusions of the government surveyor reached on practically the same evidence that we are now considering. See In re Boundaries of Pulehunui, 4 Haw. 239-251. Even though admissible, we deem it insuf-

ficient to counteract the showing of the Pelham grant and plat B of Kahua. 20 Haw. 278, 286.

Boundaries of Kahua.

But the bounds are to be determined judicially, on evidence, and with notice to all parties concerned. The surveyor is not such an officer, and the tribunal constituted for the purpose cannot take the findings of the surveyor in lieu of or in contravention to proper testimony.

Pulehunui, 4 Haw. 239, 251.

Looking at the testimony of Hamar Kalama Imikia and Kekoa, we find that they are all of the class of men called kamaaina, born and having spent all their lives on Pulehunui or the next lands, who, therefore, have a reason to profess a knowledge of the ancient, traditional lines of boundary.

Pulehunui, 4 Haw. 239, 252.

Where natural monuments are designated on a plat referred to in a conveyance, but no survey is made upon the ground, the same rule is followed (precedence of calls for natural monuments) and the tract must be considered to be run by the monuments without regard for other elements of description, even though neither the certificate of survey nor the conveyance refers specifically to the monuments.

McIver v. Walker, 9 Cranch. (U.S.) 173, 3 L. ed. 694.

A survey is part of a map. The record of the survey is the field book, which is also part of the map. There

have been placed on exhibit in this case a number of copies of one original map "with additions". In 1888 there was on file some map based on the 1885 survey of Monsarrat. This was an authorized survey of the lower section of Molokai which ended at the surveyed, undisputed lower boundary of the land in dispute. (Terr. Ex. 16.) It has been testified by Newton that his maps are "progressive maps". (R. 317.) That is, the original is not preserved and a new map made to include new surveys, but new matter is added from time to time in the office of the department, and there is no record kept as to the condition of the map at any time, nor as to who adds matter to the maps. (R. 338-339.) He says that he does not know and there is no record as to the matter shown on the 1886 map in 1888 when the patent was issued. (R. 336, 338, 339, 321, 317.) He says that the sketch which was added to the top of this map, extending the map to include Kahanui, was added after the grant (R. 338, 339, 321), and that there is no record to show what was on the exhibit at the time of the grant (R. 339), or whether the sketch on the grant, which was not part of the description furnished by Meyer as part of his description under the law (Terr. Ex. 19), was later copied into the government map and repeated by copy ever after (R. 313). Where did the Supreme Court get its facts from which it stated that there were "government surveys and maps on file"? Certainly no such evidence appears in this case.

The Supreme Court of Hawaii says of the witnesses who testified definitely as to the location of the monument Waihanau Valley and the location of the valley at its head. "The parol or extrinsic evidence relied on by applicant does not meet that test. It pertains to the object of the big water falls, but does not connect the object with the land conveyed." How can an object be more closely connected with the grant and the land than to swear that the big falls is the boundary known as the "head of Waihanau valley", that this line was marked by posts and an ancient boundary stone. They testified to many things showing their familiarity with the area, that they had lived there all their lives, that they had been told by (a) R. W. Meyer, the patentee, that Waihanau Valley lay below the falls, by (b) native Hawaiians who were the companions of their youth, even before the patent, that the ancient boundary known as Waihanau Valley was below the falls, (c) that the land claimed by Meyer as being the "land I bought by ancient boundaries the lele of Kahanui" was occupied by him for years before the grant and continued to be occupied as of right until 1924, and was not in dispute until the condemnation suit of 1929. They identify the landmark "Kaulahuki" as the big falls, and that is the monument marking the boundary of the adjoining land which the Territory acquired by deed. Meyer occupied the land above the big falls as clean lands, free from the taint of leprosy. He said that Waihanau Valley was overrun by lepers. (Ap. Ex. C-1.) How can a line be described on the ground other than by

monuments, landmarks natural or artificial known and located by witnesses?

Although the Supreme Court states that parol evidence is proper to prove "a location" (R. 48), it dismisses all of the factual evidence on the strength of the meander line on the unidentified sketch, attached to the patent but not mentioned in the description, whose author is unknown, and the location of which on the ground is not supported by one word of factual testimony. All the government testimony amounts to is the several surveyors, Newton, Jorgensen, and Howell, having examined a map presented to them from the survey office, are of the opinion, that if the line were scaled off in the office, and from the triangulation thus obtained shots were taken from the monuments on the undisputed line, the line would run as claimed by the government, and that line would follow, roughly, a line of hills or valley crests found on the ground. Very roughly. Newton says the scaled line is more than 500 feet away from his line at the critical crossing of the stream (R. 314), and 1,500 feet out from the line of Waialeia Valley. (See Newtons map, Terr. Ex. 10.)

The Supreme Court calls this a "contour line of continuous mountains meandering along the edges of the respective three adjoining valleys similar to that surrounding the ridge land of Royal Patent Number 3539". This is not true. The contour line is not continuous, it breaks at the crossing of the stream where there is no pali or barrier, the line on the east side

is the top of a gentle slope, not a mountain line, and there is no similarity between the precipice that surrounds Grant 3539 and the valley enclosed above the falls, which valley can be crossed at any point, and over which cattle can be driven and wander off from the path into the woods, there to remain hidden. (R. 215-216.)

The opinions of surveyors are not admissible to locate a boundary on the ground except where the boundary is delineated by mathematical points capable of technical location. Without the opinion testimony of the above surveyors, there is not one scintilla of proof of the government line.

Surveyors cannot give opinion evidence on boundaries.

9 *C.J.* 287, par. 345.

POINT 10.

THE ISSUED TRIED IN THE LAND COURT WAS LIMITED AND STIPULATED BY THE PARTIES TO BE THE DETERMINATION OF THE LOCATION ON THE GROUND OF THE COURSE DESCRIBED IN THE GRANT AS "AROUND THE HEAD OF WAIHANAU AND WAIALEIA VALLEYS". THE ONLY EVIDENCE OFFERED IN THE TRIAL COURT AND BEFORE THE SUPREME COURT OF HAWAII ON APPEAL WAS THAT OF THE APPLICANT AS TO THE LOCATION OF THAT PARCEL OF LAND KNOWN AS "WAIHANAU VALLEY", WHICH WAS FIXED AS THE NAME OF THE BOX CANYON BELOW THE BIG FALLS, WITH THE BOUNDARY BEING THE LINE ADOPTED BY THE TRIAL COURT. IT WAS ERROR FOR THE SUPREME COURT TO ATTEMPT, BY SPECULATION, AND WITHOUT ANY EVIDENCE, TO FIX A BOUNDARY AT ANY POINT NOT IDENTIFIED BY EVIDENCE AS THE BOUNDARY OF THE VALLEY, OR TO ASSUME, WITHOUT PROOF, THAT THE NAME "WAIHANAU VALLEY" APPLIED TO ANY PLACE NOT SO IDENTIFIED.

The Supreme Court of Hawaii had no jurisdiction to rehear the case *de novo,* weigh the evidence and then order a decree in accordance with the new hearing, considering that the record of this case largely consists of demonstrations on maps and other exhibits which are, to say the least, blurred in identification, and the Supreme Court could not in any way have completely identified the lines indicated by the witnesses. The testimony of witnesses Howell (R. 391, 380) and Jorgensen was read into the record from a former proceeding without any identification of the lines purported to be identified from unidentified exhibits. (R. 397, 382.) This testimony is wholly unintelligible without such exhibits excepting where comment is made without the exhibits, such as Howell stating that the name "Waihanau valley" (R. 402, 397, 395)

is a place name of a very small portion of the whole, and that the line shown on the sketch is a matter of interpretation (R. 401), and Jorgensen's statement that a "head" of a valley is a place, like a waterfall, over which you cannot pass (R. 386-387), including the admission of both witnesses that they took their conclusion from the map without any personal knowledge of the ground line or any competent kamaaina investigation (R. 381, 397, 400, 395, 393).

The Supreme Court was, in its retrial, if such was permitted, bound by the same rules of evidence as the trial court, and limited to the evidence contained in the record. It could not, for instance, turn to the "reservoir of surveys and maps" (R. 47), if such existed, outside the record. Newton testified that the whole of all records pertaining to the issue had been produced at the trial. (R. 349.) He said that at the time of the patent there was in existence only the survey of Monsarrat shown in Terr. Ex. 16, the field book containing the sketch of Kahanui from which the description had been taken, and identifying this waterfall on this sketched boundary as the big falls (R. 344-346, 311), locating Waihanau Valley below the falls (R. 332). He testified that at the time of the patent the sketch attached to the Grant 3437 had not been copied on to any government map (R. 321, 336, 338), but had been entered after the grant date (R. 339). If this is so, and the appellee relies upon Newton's testimony as to the location of the line claimed by it, the reservoir of maps resolves itself

into nothingness, and it is conceded by Newton that at the time of the grant there was on file no map that contained a description of the land of Kahanui. (R. 304, 305, 321, 313.) If there was no map, no "reservoir", no survey of the disputed line by traverse (R. 314, 322, 321, 319), then or afterwards, no "footsteps of the original surveyor" (R. 305) on the line, no monuments (R. 324, 325) to identify it, either erected by the surveyor or placed there by nature and shown on the sketch, how could the opinion testimony of these surveyors overrule the factual testimony of witnesses who knew, as a fact, that Waihanau Valley lay below the big falls, and that the upper boundary of Waihanau was at the big falls (R. 332), the "head" of the valley according to every definition?

The location of the line by the Supreme Court was based upon no evidence contained in the record. There was not one word in the record that Waihanau Valley existed as a location other than below the falls. The name of the little valley above the falls is "Puukawao". (R. 192.) The name of the whole watershed is "Makanalua Valley" as shown by Pease's description introduced by the appellee. The name of the waterfall is "Kaulahuki", meaning to pull (up) with a rope. This is a logical name of a place where the only way to go up or down is to climb the ieie (R. 186), a ropelike vine, or to be assisted by a rope. The topography complies with the definition by Jorgensen of the head of a valley where the head sought is not

the head of the watershed, a place where you can go no farther, like a cliff or a waterfall. (R. 387, 386.) The leper colony was selected by the government as a place of segregation where lepers might roam and by the cliffs be confined. The big falls does this. The Waihanau Valley, first selected by Meyer as his land, was overrun by lepers, so he wanted no part of it. (Ap. Ex. C-1A.) The proof of the location of Waihanau Valley, both as an ancient and well-known boundary and as the place intended by the parties to be the limit of the land conveyed, was indisputably proved by uncontradicted evidence. (McKeague, Aubery, Tuitele, Ernest Meyer, Mauritz, Penn Meyer, William Meyer, and Monsarrat's field book.)

The line of the appellee, adopted by the Supreme Court of Newton, his own line (R. 315, 343), office surveyed and located by Newton on his map without regard for monuments (R. 343) or the "footsteps of Monsarrat" purporting to be a translation of the line on the sketch attached to the grant, designated by all parties, Newton, McKeague, Howell, and the Supreme Court as a "meander line," a sketched boundary. (R. 314.) It appears on a sketch attached to the grant in accordance with the practice of United States surveyors and the land department of Hawaii of roughly sketching the land for the purpose of showing the amount of land conveyed, and indicating that there was a natural monument to be followed. The cases cited supra show that such a line is not a boundary. It is not identified by the appellee with any existing map or survey along the disputed line

nor is the author or draftsman of the sketch shown. (R. 336, 338, 339.) The several maps introduced are all copies of the first with additions. (R. 313, 312, 339, 336, 323.) One of those additions was the sketch (R. 321, 336), placed on the first map after the grant and copied therefrom into all the succeeding maps without correction or further survey. (R. 313.) It misses the real line of the cliffs which is the accepted boundary, by 500 to 1000 feet (R. 314, 315), at the point claimed by the appellee, and by 1500 feet beyond where the line purports to cross into Waialeia valley. (Terr. Ex. 10.) If the error of location, ignored by the appellee and witness Newton, who was running his own line without regard for monuments (R. 315-343), was considered to be an error of deviation from the appellant's line (see maps) the error would be no greater in distance, possibly less.

The sketch shows no data as to distance, direction, or monument along the disputed line. (Ap. Ex. B.) The government appellee insists that the sketch may possibly (R. 338, 339) be the work of Monsarrat taken from the field book. That field book, the original record of survey (Terr. Ex. 16, p. 112) shows the line following the line of the impassable cliff formed by the big fall and its supporting ridges. The sketch does not refer to any map as controlling. No map of that area was in existence at the time of the grant. (R. 317, 321.) The intent of the parties (R. 331, Ap. Ex. C-1A, C-1B, C-1C, E, D-1, P, was to give Meyer all the land that he had occupied and claimed as his. (Ap. Ex. C-1-2-3.) The only knowledge of

the boundary described by the grant in the possession of government officials was the information obtained by Monsarrat from old timers (kamaainas) describing the land by its ancient boundaries (R. 308, 322), which was repeated by him in his description "around the head of Waihanau valley". (R. 323.) The description was taken from the field notes. (R. 333, 384.) The field book was meticulously kept to show exactly what line was meant. (Terr. Ex. 16.) The line in the sketch explaining the locations passes through the big falls (R. 311, 330) and the location of Waihanau valley is entered purposely to show that Waihanau valley lies below the big falls. (R. 332.)

The Supreme Court of Hawaii, arbitrarily and without any citation of authority, or reason given except the fallacious assumption that the trial court had held that Grant 3437 had been awarded by ancient boundaries (R. 43, see R. 31), threw out all factual evidence of the location of Waihanau valley, disregarded the sketch from which the description was taken, ignored the letters of Monsarrat which he stated that he had obtained the description from kamaainas (Terr. Ex. 6, 7A, 7B), of an ancient boundary and described the land by what he had been told, waved aside the intent of the parties that the grant should contain all of the lele claimed by Meyer (Ap. Ex. B, C-1A, C-1B, C-1C, D, E, F, G, H, O, P), and created a new boundary from an unlocated, unsurveyed meander line not referred to in the description and located on the ground by a surveyor unfamiliar with the location of any monuments (R.

227), a stranger to the land (R. 318), who applied an office survey to the terrain in disregard of both the meander line and the known boundary, and created an opinion line 500 to 1000 feet from the office survey of the meander line as described by him as "following the pali" where the topography shows there is no precipice, across the valley where there is no barrier.

Dated, Eugene, Oregon,
April 10, 1953.

Respectfully submitted,
R. W. Meyer, Limited,
Appellant,
By Phil Cass,
Samuel Shapiro,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

COMPILED LAWS OF HAWAII, 1884.

42. The said Minister, by and with the authority of the King in Cabinet Council, shall have power to lease, sell, or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Kingdom, subject however, to such restrictions as may, from time to time, be expressly provided by law. And provided that no sale of one land or lot exceeding five thousand dollars in value shall be made without the consent of the King and a majority of the Privy Council.

TO REQUIRE THE SALE AND LEASES OF GOVERNMENT LANDS TO BE MADE AT PUBLIC AUCTION

Section 1. All sales or leases of government lands shall be made at public auction, after not less than thirty days' notice by advertisement in two or more newspapers published in Honolulu, in both the Hawaiian and English languages, excepting lands and portions of lands of less than three hundred dollars in value. All such sales shall be made at the door of the Government House, at Honolulu, and shall be cried by the Minister of Interior, or by one of his clerks, under his direction, who shall perform this service without extra compensation.

Notice of sale herein above required to be made, shall contain a full description of the land to be sold, as to locality, area, and quality, with a reference to

the survey, which shall in all cases be kept in the office of the Minister open to inspection of any one who may desire to examine the case.

In case application has been made for purchase of a Government land, and a price has been offered for same, the price offered shall be published in the notice of sale as the upset price for which the land should be offered at public auction.

Section 2. The provisions of this Act shall not extend or apply to cases where the Government shall by quit-claim, or otherwise, dispose of its rights in any land by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of Government lands in return for parcels of land required for roads, sites of Government buildings, or other Government purposes.

---

43. A Royal Patent, signed by the King, and countersigned by (the Kuhina Nui) and the Minister of the Interior, shall issue under the great Seal of the kingdom to the purchaser in fee simple of any government land or other real estate; and also to any holder of an award from the Board of Commissioners to quiet land titles for any land in which he may have commuted the Government rights.

44. All Royal Patents, leases, grants or other conveyances of any Government land or real estate, shall be prepared by and issued from, the Department of the Interior; and it shall be the duty of the Minister

of the Interior to keep a full and faithful record of all such patents, leases, grants, and other conveyances. Said record shall be open to public inspection, and he shall furnish a certified copy, under his official seal, of any instrument therein recorded, to any person applying therefor, upon being paid at the rate of fifty cents for every one hundred words. Every such certified copy shall be received as evidence in any judicial court of the kingdom, the same as the original instrument itself.

45. It shall be the duty of the Minister of the Interior to cause such surveys, maps, and plans of the Government lands, harbors, and internal improvements to be made as the public interests may require; which surveys, maps and plans shall be kept in his office for public inspection and reference.

TESTIMONY OF NEWTON, CHIEF CADASTRAL ENGINEER, SURVEY DEPARTMENT, GOVERNMENT WITNESS.

(1) 311 Q. When the next surveying job was done, these were all resurveyed in here, or was the next section just put on to the end of this map? A. I believe a new map was made altogether of the other section.

Q. But the new map was simply a copy of the section already in? A. Yes. The adjacent boundary of the land would be shown on the second map.

Q. The adjacent boundaries are shown, but the work is unchanged. For instance, the boundaries of

Kamiloloa, if they are shown on a compiled map of the whole island of Molokai, would be taken right off this map and scaled to the scale of the new map? A. Generally yes.

312 Q. There would be no resurvey of the lands of Kamiloloa for the purpose of making a completed map of the other job. A. No. Unless it were necessary to get a little more information.

* * * * * * *

Q. So that in this series of maps that the government has offered, the land of Kahanui, as shown here, has been recopied from the same sketches that appear on the previous maps, simply to complete the map. Isn't that true? A. It is based on previous maps.

Q. Yes. So that is a tracing follows the lines of the work sheet here, the same tracing will follow the lines on these other government maps as there is no resurvey of Kahanui? A. That is the idea.

313 Q. So that actually as the survey and map of Kahanui, there has been one map, copied into a number of different maps of various areas but just the one survey and the one map of Kahanui has been used in the copying? A. That is my belief.

323 Q. So that this, although it is on a scale of 2000 feet to the inch, is plotted or traced from the other map or photostat * * * A. And there may be additions.

324 Q. And this is a map from which, apparently the sketch that appears attached to the patent was taken? A. That is possible.

(2) 312 Q. But that is the general practice, is it not, you make a survey of one section, complete the map, make a survey of the next section, complete the map, and continue on until you have the complete map of Molokai, or of some other island, then the whole is one complete map, which is then based actually on copies of the previous maps, isn't that correct? A. Yes * * *

313 Q. The authority for each map for the boundaries is the authority for the first map that was made? A. The boundaries are defined on two sides and the easterly and northerly boundaries are also indicated as running along the pali lands.

Q. It is definite in that the boundary follows the natural monument or pali? A. Yes.

319 Q. (218) Now, in connection with this map, have you any record of an additional survey made by any person by which this dash and two dot line was placed on the northern and western boundaries of the land sketched in? There is no such mark on the work sheet. A. I don't think there has been any other surveying outside of Monsarrat's, which map shows on some of the other government maps, but it seems to me that the Land Court survey is the first complete survey of that area.

324 Q. I asked you if there appears on this map, for the record, an indication along the disputed boundary line or on the Waikolu boundary anything other than the straight line, showing a natural monument described by name or otherwise on the map

itself? A. It is a reproduction of the larger scaled map and would be absolutely the same as the other.

(3) 312 A. Yes, they would just show the large lands, not the small areas.

Q. But, whatever would be shown on the large maps would be taken off the other maps? A. Yes.

313 Q. (312) Yes, in other words, as far as Kahanui is concerned, there is one map here, it has been copied into other maps from the authority of this sketch or this map? A. Based on Monsarrat's map.

319 Q. You don't know that this boundary here does accurately follow the line on the ground? A. No, I don't. In fact the top of the pali, the edge of the pali is the boundary.

338 Q. Let's see if I understand your testimony, You testified that there is in existence this map in the survey office, that it, as far as you know, is the only map, or the first map from which the boundaries are traced on other maps. Is that so? A. Yes.

(4) 317 Q. This map is dated 1886. How come Grant 3539 to Meyer appears on the summit of the ridge when that grant was not granted until two or three or four years later? A. Our maps are progressive maps. * * *

318 Q. They insert the title. Do they insert anything else? A. The area, the grant and the grantee.

Q. Do they insert additional topographic information? A. Yes.

303 Q. Do you know who actually did the draftsman's work on this map? A. The working sheet is

generally on a job like this it takes months and sometimes years, and the drafting work is done right where you are doing the work. It is a progressive map. * * *

304 Q. Is the word "Grant 3437, Meyer" his printing? A. No. That came later, after the grant was issued.

323 Q. * * * I presume it is traced from the other map because the other map is in one section? A. And there may be additions.

Q. There may be additions? A. Yes.

334 Q. Now, Mr. Newton, I have asked several times during the course of this trial, if there is any proof in your own personal knowledge or on the records of the survey office as to who (335) actually put the sketch of Kahanui on the various Government maps that have been in existence. Is there such proof? A. I cannot say absolutely.

336 Q. Now, speaking of the sketch which is attached to the patent 3437, Do you, or do you not know who placed that sketch upon the map? A. I don't know definitely.

Q. You don't know whether or not that tracing was actually on a government map prior to 1888? A. I don't know unless I am told by the date of the map itself.

Q. But the map, you testified, had additions from time to time; that is right? A. Any additions were very few.

339 Q. You don't know whether the tracing of this map was made by Mr. Monsarratt, or some other person? A. I cannot say definitely.

Q. Do you know that all your map data was as appears now or was this data later? I am asking you if you know? A. I don't know positively.

(5) Q. It does not show in his field book at any location? A. I do not find it here.

Q. And if you cannot find it, it is not there. As I understand it, this map starts below and this survey covers these particular lines and these lands. When the next surveying job was done these were all resurveyed here, or was the next section just put to the end of this map? A. I believe a new map was made altogether of the other section.

Q. But the new map was simply a copy of the section already in? A. Yes. The adjacent boundary of the land would be shown in the new map.

303 A. Well the boundary line. Sometimes they are not even surveyed, the boundary lines.

304 Q. And what does this lack of the dash and two dots on that boundary indicate; that it was not yet surveyed finally? A. Probably he hadn't written the description; the grant was made later, after the map had been completed.

305 Q. But this was put in without a dot and dash line sometime after this particular map was made? A. Yes. He had to have something to base the boundary line on and that was his determination of the boundary of Kahanui, Apana 2 (section 2).

Q. Do you know that has any indication that he was ever on the ground to make the survey? A. He actually—his field notes show where he took actual shots to all points.

307 A. No. In fact he wouldn't know because he had no survey of it.

Q. He wouldn't have to have a survey of it if he sketched what the kamaainas told him the boundaries were. A. But he would have to make a survey before (308) he could get proper boundaries for the ili itself.

Q. Let me understand that, Mr. Newton. That he had to have a survey on the ground to determine, to lay off the boundaries of this land, before he could determine the boundaries? * * * A. These boundaries of Kahanui would really depend on the boundaries of the adjacent land. Q. The lower boundaries, yes. A. Where they had already been awarded. Q. Yes. A. Then the only remaining part would be the gulch, which would be the natural boundary, and the edge of the pali.

314 Q. Do I understand Mr. Newton, then, that this northern and westerly boundary is a sketched boundary and not a surveyed boundary of that sketch? A. Monsarrat did locate points along the top edge of the pali but he did not have enough. Q. When? A. When he was down in the valley (referring to the survey Terr. Ex. 17 and 18, dated 1890 and 1894). Q. He had not located them in 1888, had he? A. I don't know.

319 I don't think there has been any actual surveying, outside of Monsarrat's, which map shows on some of the other government maps, but it seems to me that this Land Court survey is about the first complete survey of that area. Q. That is, actually following the line on the ground. A. That is a more accurate survey of the edge of the pali.

322 Q. That is true. He made a survey of the land. But I am speaking of the survey by traverse, actually the surveyor going out and putting flags and running his instrument and having his chain and cutting brush along this line of the north and westerly boundaries. That had never been done at the time, had it? A. No. Only the southerly and easterly and northerly boundaries were run along the monument the top of the pali. Q. They were simply described by monument? A. Yes, by monument. Q. There is no pretense at all that this boundary line follows the monument? A. That was the line that was established by kamaaina evidence and Monsarrat reproduced it on his map.

(6) A I don't think there has been any other surveying outside of Monsarrat's, which map shows on some of the other government maps, but it seems to me that this Land Court survey is about the first complete survey of the area.

(7) 334 Q. Now, Mr. Newton, I have asked several times during the course of this trial if there is any proof in your own personal knowledge or in the records of the survey office as to who actually put

the sketch of Kahanui on the various government maps that have been in existence. Is there such proof? A. I cannot say absolutely.

336 Q. Now, speaking of the sketch which is attached to Grant 3437, do you, or do you not know who placed that sketch upon the map? A. I don't know definitely.

337 Q. You testified the other day that there is nothing in the field books that were introduced in evidence to indicate that any of these lines are on (338) the boundary of anything. * * * A. No, they are not mentioned in the description itself, but they are shown on this working sheet as colored in to establish the limits of Kahanui. Q. But you don't know who colored that in except by guess? A. Monsarrat is responsible for the map. Q. Again, you don't know who colored that in, do you? A. Well Monsarrat * * * Q. Do you know? A. Well I did not see him do it. Q. Do you have any records to show that he did do it other than your guess from the fact that it is his map? The Court. Mr. Newton, do you of your own knowledge know whether Mr. Monsarrat—— A. I do not know positively. The Court. ——whether Mr. Monsarrat inserted the red line Mr. Cass is asking about? You either know or you don't know. Do you know of your own knowledge as a fact that he did? A. No. That was before my time so I would not know. The Court. You don't know? A. I don't know. At the time he did the job, no.

339 You don't know whether this tracing of his map was made by Mr. Monsarrat or some other person? A. I cannot say definitely.

(8) 304 Q. Is the word "Grant 3437 to Meyer" his printing (Monsarrat's)? A. No, that came later, after the grant was issued.

305 Q. But this was put in without a dot and dash line sometime after this particular map was made? A. Yes. * * *

310 Q. I note on this map in pencil the word "Waiau". Does the word "Waiau" appear in any part of the survey of this land, or the field books concerning this land * * *? (339) It does not in his field book at any location? A. I do not find it here.

317—Q. Can you tell me from what survey or surveys this map was compiled; would it be the same survey as the work sheet? A. Yes, probably with few additions. Q. Yes. This map is dated 1886. How come Grant 3539 to Meyer appears on the summit of the ridge when that grant was not granted until two or three or four years later? A. Our maps are kind of progressive maps. After these lands are granted and the government has no more interest in that particular piece, they insert the title. Q. (318) They insert the title. Do they insert anything else? A. The area, the grant, and the grantee. Q. Do they insert additional topographical features? A. Yes. Anything new like that pipe line, for instance. That has been added on. The pipe line which

is shown in blue is added to the map. Q. When was that pipe line added to the map? A. I don't see the date there. * * * A. I would not know anything about it because I am not too familiar with that section.

319 Q. One is practically a copy of the other or it should be a copy of the other? A An exact copy with additions, probably.

323 A. And there may be additions. Q. There may be additions? A. Yes.

336 Q. You don't know whether that tracing was actually on a government map prior to 1888? A. I don't know unless I am just told by the date of the map itself. Q. But the map, you testified, had additions from time to time; that is right? A. Any additions were very few.

338 Q. Do you have any records to show that he did do it, other than your guess from the fact that it is on his map? A. I do not know.

394 Q. In connection with the interpretation of the boundary line in this grant, did you make any observations or study of the topographical features of the land? A. (Howell) Yes. Inasmuch as the last two courses in that description are not by actual surveys but by statement that "Thence around the head of Waihanau and Waialiea valleys".

* * * * * * *